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Definitions of Freedom

III. Marx vs. Schopenhauer

Third in a Series of Four Articles

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I

A GENERATION separated Arthur Schopenhauer and Karl Marx, a generation and an abyss. Schopenhauer was born in 1788, more than a year before the Bastille was stormed and razed; Marx, almost three years after the Battle of Waterloo, in 1818. The years between encompassed the age of the French Revolution and the great Napoleon. For Schopenhauer, those stormy decades were the ones which shaped his personality. For Marx, they were past history. Both men were Germans and both breathed the air of cosmopolitan universalism characteristic of the intellectual Germany of the day. Neither of them fell victim to the virus of nationalism which began to poison German thought after the impact of the French Revolution.

For Marx, Germany in the age of rampant Prussianism had no room. At the age of 25 he fled abroad and, except for a brief interlude during the revolutionary period of 1848-49, never set foot on German soil again until his death. It was an ironic coincidence that the citadel of capitalism, Great Britain, granted its arch foe asylum, when even France refused to tolerate his presence.

Both men were masters of the pen. Their battlefield was the cluttered desk. Schopenhauer's study in Frankfurt and Marx's den in London were, however, as far apart as the poles. The aristocratic solitude in which Schopenhauer, practically unknown to his contemporaries and without outside encouragement, spent the four decades following the publication of his philosophical chef d'oeuvre, *Die Welt als Wille und Vorstellung* (1818-19), was a truly Hegelian antithesis to the turbulence of correspondence, international polemics, and revolutionary plotting swirling about Europe.

Neither of the two men made a living. Schopenhauer's father died conveniently at the very time when his son was confronted with the choice of a profession. The decision to become a philosopher led young Arthur first to Goettingen, where he registered as "a philosopher" (age 21), thence to the newly established University of Berlin. There Fichte, champion of a cosmic nationalism, failed to attract him, and he left Berlin for Jena. His basic work was published in 1819. An attempt to establish himself in the academic profession at the University of Berlin (1821) ended in utter failure (1829). The students, having a choice between professors like Hegel and a young acidy lecturer like Schopenhauer, chose Hegel. Schopenhauer retreated to his Frankfurt hermitage where

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he lived comfortably on the fortune inherited from his father.

Karl Marx also had a bourgeois father, a lawyer in the one-time capital of the western Roman empire, Trier. Unlike Schopenhauer, however, Marx did not come into a fortune which relieved him of financial worries. In lieu of a suitable father, he acquired an obliging friend, Friedrich Engels. This textile manufacturer became so completely devoted to the ideas of his brilliant friend Karl that he not only developed into the most important disciple of the revolutionary philosopher, but also considered it a personal honor to finance him to the best of his ability. This allowed Marx to concentrate on his political and intellectual pursuits without having to worry about his daily bread and butter. The voluminous Marx-Engels correspondence itself was destined to become one of the most important literary creations of scientific Marxism.

Their philosophy of life and their interpretation of history can concern us here only insofar as they pertain to the concept of freedom. The change in such concepts since the days of Hobbes and Locke, or Robespierre and Jefferson has already been noted briefly in the preceding articles of this series. The fateful contributions which Schopenhauer and Marx have made to this evolution will form the subject of this article. Schopenhauer, the economically secure, despised matter and saw ultimate freedom only in man's making himself independent of its influence. Marx, the eternally insecure, saw in permanent economic security man's chief hope of spiritual salvation.

II

For Schopenhauer, the era of the French Revolution developed and formed his views of freedom. The rapid overthrow of age-old institutions, the frenetic activity which characterized this epoch in the social and political sphere, served to bring out his latent opposition to what he called the "will", i.e., the activist attitude of man towards the material world.

> Great violence of desire in itself is a direct and permanent source of suffering. . . . Since frequent and vehement suffering is inseparable from frequent and vehement desire, the facial expression of any very evil man already bears the stamp of internal suffering. . . . An indirect mitigation—he is incapable of finding a direct one—he seeks in the observation of the suffering of others in which he recognizes also an expression of his own power . . . . a phenomenon of which history offers numerous examples, such as the Neros, Domitian, and Robespierre.

It may be a matter of dispute whether or not Nero's or Robespierre's face showed much internal suffering, but Schopenhauer's reference to the Jacobin leader reveals his attitude about party-dictatorship. A rugged individualist, Schopenhauer could never accept a political framework in which individual freedom was subject to party despotism. His unwillingness to prefer man-made standards to "natural" ones made him support on more than one occasion Napoleon's statement which he quoted verbatim and approved: *Tout ce qui n'est pas naturel est imparfait.*

As an old man, Schopenhauer's attitude towards Napoleon's role in history became more critical. He, who had not considered it necessary to bear arms for the overthrow of the Corsican conqueror in 1813, spoke of the Napoleonic era more than thirty years later in the following terms:

> You can always observe that faith and knowledge are comparable to a pair of scales. When one rises the other is sinking. These scales are so sensitive that they even react to ephemeral influences. For instance, when in the beginning of this century the predatory expeditions of the French hordes under their leader Bonaparte and the great effort needed for the expulsion of that mob of brigands caused a temporary neglect of scientific pursuits and thus a lessening of the general spread of knowledge, the Church began at once to raise its head.

In this temporary lowering of cultural activities, Schopenhauer saw a great danger. For he, like Marx, looked upon organized religion as beneficent only for the stage of mankind's intellectual infancy, a period which he assumed was fast approaching its end. Freedom from religious authority for Schopenhauer was an integral part of his concept of liberty.

A man of his cosmopolitan outlook was, of course, immune to the rampant lunacy of European nationalism which rose to an ever higher pitch during his lifetime. Germany's stony refusal to honor him as one of her great thinkers may have poisoned his atti-

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tude about German national characteristics. But what he had to say about national pride in general shows clearly that for him allegiance to any "nation" was a senseless restriction of human liberty. In this point Schopenhauer, the cosmopolitan, and Marx, the internationalist, were in thorough agreement:

> The cheapest kind of pride, however, is national pride. For it betrays in the one afflicted with it the lack of individual qualities of which he might be proud. Otherwise he would not grasp what he shares with so many millions.

The apostles of French, German, Italian, Russian, and even Anglo-Saxon "culture" would, of course, hardly agree with this tenet. But millions of Italian Fascists and German Nazis at least have given gruesome proof of the truth of Schopenhauer's opinion:

> Who possesses great personal qualities for himself will on the contrary see the faults of his own nation most clearly because he has them continually before his eyes. But the miserable fool who has nothing in the world to be proud of grasps as his last straw the pride in the nation to which he happens to belong.

Racism, that plague of our scientific age, held no appeal for Schopenhauer. Individual liberty was not to be confined to any race or creed. Unlike Jefferson, who considered black slaves beyond the pale of the white man's inalienable rights, Schopenhauer went so far as to chide—although on dubious scientific grounds—his contemporaries:

> The Adam of our race at least must be assumed to have been black, and it is ridiculous that painters depict this first man white. . . . Moreover since Jehovah has created him in His own image, He too should be depicted as black in all paintings. . . .

Higher levels of civilization were reached by dark and white peoples alike, and the contemporary pre-eminence of the lighter-skinned race was, according to Schopenhauer, not due to inherent superiority but to the material influence of a less favorable geographical milieu which spurred the pale-faces on towards greater feats of civilized ingenuity in order to survive. There was thus no room for any master-race or any chosen people in the international arena which Schopenhauer surveyed. He defended far more completely than Jefferson the fundamental equality of all human beings. His "scientific" arguments in favor of his views may seem antiquated and often somewhat ridiculous but, after all, the concept of any universal inalienable rights is an axiom and therefore beyond the reach of scientific proof.

The concept of liberty in all its ramifications was analyzed by Schopenhauer time and again. In his main work, for instance, he naturally began with the conflict between free will and natural necessity and agrees with Kant in clarifying this limitation. Freedom for him is the very antithesis of Rousseau's liberty of the noble savage. Beasts and plants, as well as dead matter have no freedom:

> With the same inevitability with which a stone plunges earthward a hungry wolf digs teeth into the flesh of his prey. Necessity is the realm of nature; freedom is the realm of mercy (*Gnade*).

Schopenhauer's concept of freedom as a magnificent achievement of human evolution and not as an "inalienable" right struck a note similar to Goethe's:

> He alone deserves freedom and life
> Who daily must conquer both anew.

In keeping with this view, the idea of the freedom of the human will, according to Schopenhauer, had to be invented to combat evil. For fatalism would make any struggle of man to improve himself nonsensical.

His most detailed opinion on the basic question of human liberty, the freedom of the human will itself, was rendered in his *Essay About the Freedom of Will* (1839) which won the prize awarded by the Royal Norwegian Society of Sciences at Trondhiem. The motto of the essay (borrowed from Malebranche) speaks for itself: *La liberté est un mystère.* The Latin topic proposed by the learned society was, "Whether or not man's free will can be proved through his own consciousness." Schopenhauer's first approach to the question was to give a definition of freedom. He saw in it first of all a negative: the absence of all hindrance. Physical freedom therefore meant the lack of all material restraints. Intellectual freedom was contingent upon man's ability of correct observation. Mental illness, as well as temporary limitations of man's rational faculty,

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resulting from drugs, emotions, or other factors may then deprive man of this liberty. "In one word, man always does only what he wants to do, and yet does it by dint of necessity."

Moral freedom therefore implied man's ability to decide what he wanted and under normal conditions to be responsible for his acts, even if they resulted from a chain of events over which he had no control. Political freedom finally was for Schopenhauer compatible only with democratic government.

> A people is called free. That means it is ruled by laws alone, but by laws which it has itself established. For thus it only obeys its own will. Political freedom therefore belongs to the sphere of physical freedom.

The somewhat vague and thoroughly theoretical concept of freedom which Schopenhauer developed obviously included the traditional concept of Jeffersonian democracy: democratic government through acceptance of majority decisions. Intrinsically, Schopenhauer felt more strongly perhaps than any political philosopher the inherent contradiction of man's claim to freedom in a universe governed by immutable and inexorable scientific natural laws. A biological compound of living cells, man was and always would be subject to the brute needs forced upon him by the desire for physical survival. The will to live, therefore, would like all other manifestations of "will" keep man from ever being fully free.

Yet the gradual realization of his ability to surmount the bestial prerequisites of his existence on this planet had paved the way for man's greatest achievement: the discovery of a limited zone in which freedom was really possible. To widen this sphere was in Schopenhauer's (and Marx's) opinion, man's primary duty and his supreme glory. For only by overcoming material bonds to an ever-increasing extent would he be able to approach that state of cosmic freedom which Buddhism defined as Nirvana: absolute freedom would equal nothingness.

On the mundane level, this outlook upon freedom meant, of course, the most sweeping cosmopolitanism. Economic well-being was merely a useful prerequisite to free man's mind of the greatest and most natural physical desire, the will to survive, and thus enable him to devote himself to loftier interests. Political liberty beyond the bounds of the ludicrous national states or the even less defensible limitations of race or religious creed was for Schopenhauer the natural goal. Democracy as the only known device of blending freedom with organized society was therefore the necessary path to the future. And that the right to free decision was not an absolute individual right Schopenhauer himself proved a year before his death: the 71-year-old philosopher saved a nine-year-old boy from a suicide attempt by pulling him out of the water and befriending him thereafter. The world might be a pretty sorry place and leaving it a cause to rejoice, but suicide itself was a cowardly abuse of man's freedom of choice. The battle for greater freedom had to be fought this side of the grave.

III

Schopenhauer, scion of a patrician family in the self-governing city-state of Danzig, did not grow up in the shadow of monarchic despotism. Politically and economically his individual freedom had been assured to such a degree that in his subsequent philosophical evolution he denied the validity of all material ties and man-made institutions. A philosophical nihilist he saw the best acceptable compromise between the ideal world (in which all human desire, all "will", had been eliminated) and the realities of our planet (which demanded collective organization for the benefit of joint survival) in a democratic society obeying its own will by means of self-imposed laws.

Karl Marx's early years were spent in quiet Trier, and only when he was about seventeen did he leave his sheltered home town to attend in succession two Prussian universities, Bonn and Berlin. From the study of law, he changed to history and philosophy and was awarded his Ph.D. in 1841.

In Schopenhauer and Marx we see two products of German nineteenth century universities. Ph.D.'s both, both trained along the same classical humanist lines, and yet how utterly different in their intellectual response to the atmosphere of their times! During Schopenhauer's inaugural disputation at Berlin he had been attacked by the formidable

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Hegel, the grand master of German philosophy, but with the help of another professor, he succeeded in carrying his own point in the discussion. When Marx obtained his doctorate, Hegel had been dead for about ten years, but in the absence of new giants in the land to take his place, his spirit still dominated the philosophical circles of Berlin. Young Marx inevitably came under his spell and, although his well-known radicalism excluded him automatically from an academic career in the Prussian or any other of the state-universities of the German Bund, he none the less received his fundamental concept of liberty from Hegel.

This rarely-read but much maligned thinker, like Schopenhauer, saw in the gradual evolution of human freedom one of the proudest manifestations of the benign *Weltgeist* in the history of the human race: "History is 'the progressive realization of freedom'." In historical perspective, Hegel traced this evolution from oriental despotism, where only a single individual was "free", to Greece, where only some were free and others slaves, and thence to the Christian Germanic groups which Hegel credited with the discovery that every single human being was inalienably free. Only in the individual state, however, could freedom find its organic manifestation. This view, of course, suited the empirical facts of history, but it did not allow for the cosmopolitan dream of a universal brotherhood of free men transcending the historical limits and limitations of the multitude of sovereign states.

In his "idealistic" approach, Hegel like Schopenhauer failed to make sufficient allowances for the important influence which economic and social institutions themselves might have upon the evolution of human freedom. At that point, the Marxian adaptation of Hegelian concepts of freedom began to diverge. It took from Hegel and Schopenhauer the principle of historical evolution, i.e., the basic belief in human progress towards a higher, a better, a freer form of existence. But Marx came to the conclusion that this progress was contingent exclusively upon consecutive changes in the economic structure of organized society.

After two years as a struggling journalist, he saw his paper the *Rheinische Zeitung* suppressed for its radicalism. This was early in 1843, the decisive year of Marx's life. Jobless, he married Jenny von Westphalen, blue-blooded young lady who—as many writers have pointed out with glee—was a lineal descendant (on her mother's side) of that Earl of Argyle who had been executed by James II. In the fall of that eventful year Marx—at the age of 25—took up residence in Paris as a German refugee.

His first major outburst from his new home was a violent anti-Semitic diatribe. By identifying bourgeois commercialism with Jewish business initiative in the best Nazi manner, he came to the somewhat surprising conclusion that only by the liquidation of Judaism could bourgeois commercialism be destroyed. This liquidation, of course, was not meant to take place in the gruesome style preferred by Hitler but by integrating the Jews into the society of the future on the basis of complete equality.

In 1847 Marx and his newly acquired apostle and friend Engels were commissioned to write a programmatic essay for the so-called Communist League. This small group embraced a wide variety of progressive elements, ranging from democratic liberals to utopian anarchists. The result of Marx's labors was the famous *Communist Manifesto,* published in 1848. It came obviously too late to exercise an important influence upon the course of the widespread revolutions which shook Europe in the course of that year but it became a classic of socialist literature, invoked with equal ardor by Stalinist-Communists, Tito-Communists, as well as Trotskyists, and non-authoritarian socialists of all shades of pink. Its views concerning freedom must be considered among the most important utterances of Marx on the subject.

For Marx, the history of the then dominant continent, Europe, clearly showed the change from feudal to bourgeois forms of economy as a great step towards a better world. On the other hand, "the bourgeoisie" —Marx wrote only too truly—"has put an end to all feudal, patriarchical, idyllic relations. . . . . It has drowned the most heavenly ecstasies of religious fervor, of chivalrous enthusiasm, of philistine sentimentalism, in the icy water of egotistical calculation . . . . and in place of the numberless indefeasible char-

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tered individual freedoms, has set up that single, unconscionable freedom—free trade."

This grotesque conclusion from historically accurate observations derived from the adoption of free trade principles in England, the leading industrial power. It remained for Marx throughout his life the main yardstick of his social and political theories. As always, organized and unorganized labor alike then cared less for fellow-workers across the sea than for its own pay-check. Today, with the blessing of all the labor unions, the United States pump-primes billions of dollars each year into our own inflated economy under the pretext of lending it to dollar-starved foreign countries (which except in rare cases are forced to spend these loans in this country for American goods and produce). Preferring this method to the obvious alternative of a modicum of free trade, we are acting in line with the above-quoted bit of Marxist philosophy.

Yet the bourgeois victory over the feudal world had brought freedom a great step closer, Marx thought:

> The bourgeoisie has . . . . been the first to show what man's activity can bring about. It has accomplished wonders far surpassing Egyptian pyramids, Roman aqueducts, and Gothic cathedrals. . . . The bourgeoisie, by the rapid improvement of all instruments of production, by the immensely facilitated means of communication, draws all, even the most barbarian, nations into civilization. . . . During its rule of scarce one hundred years, it has created more massive and more colossal productive forces than have all the preceding generations together.

This paean of praise from the pen of Marx shows the full swing of his exuberant optimism at the height of the Industrial Revolution. Today's Communist publications dare not comment on this aspect of Marxism, its glorification of bourgeois achievement at a time when Russia was still sunk in the depth of the pre-bourgeois era. The chief objection of Marx to the bourgeois epoch was the inequality with which industrial labor participated in the spoils of man's mounting mastery of the forces of nature. The millions of underprivileged workers held in economic bondage by a relatively small group of thriving beneficiaries of the Industrial Revolution made the then existing order of things wholly inacceptable for Marx. No freedom which did not include a substantial measure of economic freedom, i.e., open access to the improved living conditions made possible by the bourgeois era, would suffice. In one of his most controversial dicta Marx formulated his objections as follows:

> In bourgeois society capital is independent and has individuality, while the living person is dependent and has no individuality. And the abolition of this state of things is called by the bourgeois abolition of freedom and individuality. . . . By freedom is meant under the p.esent bourgeois conditions of production, free trade, free selling, and buying.

The expropriation of private means of production was for Marx the only way to overcome the gross economic inequality which aroused his ire. It was not a philosophical axiom.

The triumphant discovery of the importance of economic factors in history led Marx with maniacal oversimplification to the above assumption that economic "anarchy" was identical with bourgeois concepts of freedom. While the liberal economists of his time might subscribe to such doctrines, historical actuality has never permitted the rise of an organized modern state in which there were no domestic or internationally binding restraints imposed upon the vaunted laissez faire principles of economic freedom.

The deadly fallacy of Marx's historical prophecy about the changing concept of freedom from the bourgeois to the proletarian ideals has been revealed in the last hundred years. He bitterly attacked men who like Proudhon believed in the possibility of the peaceful modification of bourgeois societies, a gradual extension of the full blessings of political, social, and economic equality of opportunity to all citizens. Marx contemptuously called such men "bourgeois socialists" and turned against them the merciless batteries of his intellectual arsenal.

Yet all states of Western Europe except Italy and Spain have since proved the feasibility of eliminating many if not all of those limitations to human freedom against which Marx fought so staunchly. The British dominions no less than the United States have followed the European pattern more slowly

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but just as inevitably. The insistence upon a modicum of "economic freedom" was perhaps the most important addition of Marx and Engels to the changing concepts of freedom. Their analysis of the past was as brilliant as their predictions of the future were inaccurate. Their main fault: the insistence on economic betterment as a cure--all of human troubles. In one of its best and almost lyrical expressions, Engels put it thus:

> Hegel was the first to state clearly the relation between freedom and necessity. To him, freedom is the appreciation of necessity. Freedom does not consist in the dream of independence of natural laws, but in the knowledge of these laws. . . . Freedom of the will therefore means nothing but the capacity to make decisions with real knowledge of the subject.

In this fine syllogism, "real knowledge of the subject" implied, of course, that only a single logical decision was possible on the basis of such knowledge, a highly dangerous oversimplification of the elementary features of human nature. Engels went on:

> Freedom therefore consists in the control over ourselves and over external nature. . . . It is therefore necessarily a product of historical development.

And then, carried away from his usual doctrinaire moorings (with the full sanction of Marx who collaborated on these essays of Engels), he ended his discourse on freedom with the true humility of a scientific historian:

> But how young the whole of human history still is, and how ridiculous it would be to attempt to ascribe any absolute validity to our present views is evident from the simple fact that all past history can be characterized as the history of the epoch from the discovery of the transformation of mechanical motion into heat to that of the transformation of heat into mechanical motion.

The inescapable allusion to history in purely materialistic terms showed at once the new ingredients of Marxist concepts of freedom and its monomaniacal overemphasis of life's purely material foundations. In this respect Marx is both broader and narrower than Schopenhauer in the definition of freedom. However wrong the exclusively materialistic interpretation of freedom may have been, it gave an important impetus to the steady movement towards more universal economic betterment which characterized the nineteenth century. "Freedom from want" has rapidly become a goal towards which "bourgeois" states aspire no less than so-called "socialist" states.

While Schopenhauer considered the achievement of individual freedom primarily a historical process in the evolution of man's character and mind, an evolution which would make him as little dependent upon material things as were the hermits of old or the fakirs of the present, Marx hoped to free men from the domination of material desires by giving them enough to satisfy all physical needs. He expected this to result from increasingly successful exploitation of natural resources. Neither of the two had any use for government as such. Schopenhauer shared in the liberal opinion that the less government there was the better men would be. Marx, surprisingly enough, was even more emphatic on this subject. A truly free society would only arise on the grave of the modern centralized state. His famous "withering away of the state" theory expressed the fondest and to date most erroneous hopes of Marx in this respect.

The great pessimist and the utopian optimist thus saw eye to eye. Government at best was a necessary evil which did not guarantee individual freedom—except on paper. In practice, it was bound to encompass freedom with barriers. The area of freedom left inside those barriers still is the primary difference between the much maligned bourgeois states and the allegedly Marxist states of our era.

When a young German immigrant from the Sudeten area of Czechoslovakia applied for citizenship in flawless English, the judge asked him how he had learned the language so perfectly and so soon.

"I picked it up", he said, "from reading the comics."

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PROBLEMS IN UNDERSTANDING RUSSIA

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What are our chances of success?

THE crucial question of our day, our relationship to Russia, persists unanswered. The lifting of the Berlin blockade, the renewal of the Council of Foreign Ministers' meetings, the lowered tone of the East-West propaganda war, and other events, have raised speculations concerning understanding with Russia. A prominent theme in these speculations is the oft repeated query whether such understanding is not in fact barred by the foreign policy principles and current pronouncements of the chief protagonists—the United States and the U.S.S.R.

As far as the United States is concerned, it is hardly necessary to labor the point that, aside from the historical tradition of friendship which had prevailed in the relations of the two countries up to the time of the Russian revolution, there is nothing in the basic principles of American foreign policy which would deny the possibility of the coexistence of the Western and Soviet political systems. Moreover, surprising as it may seem in view of the recriminations of the "cold war," the record of official American pronouncements in recent years, taken as a whole, has never definitively barred the road to an understanding with Russia.

A few examples will illustrate this point. On March 17, 1948, at the peak of the "cold war," President Truman motivated his request for universal military training legislation by reference to Soviet obstructionism and expansionism in the post-war period. Nevertheless he concluded with the statement that "the door has never been closed, nor will it ever be closed, to the Soviet Union or any other nation which will genuinely cooperate in preserving the peace." The following May 5, Secretary of State Marshall told the House Foreign Affairs Committee that it was a Soviet misconception to suppose that different systems could not live side by side in peace under the rules of international conduct prescribed by the United Nations charter, and that it was the task of the United Nations and the United States to dispel that misconception.

The same idea pervaded the famous *aide memoire* which Ambassador Bedell Smith handed Molotov on May 4, 1948. Contending that the United States foreign policies which Moscow finds objectionable could be dispensed with if an end were put to attempts by Communist minorities to seize power in various countries, the *aide memoire* expressed hope that these attempts will cease. It asserted that "as for the U.S.A., the door always remains open for the discussion and settlement of our differences," that the United States stands ready to contribute to world stabilization "which will be fully compatible with the security of the Soviet people." While the subsequent rejection of Molotov's overtures for bilateral negotiations was widely regarded as a backing out by the administration, it may be remembered that the State Department pointed to other channels available for multilateral negotiations. And President Truman reiterated this position the following month, when he stated at Berkeley on June 12 that "the door is always open for honest negotiations looking towards genuine settlements," though not "for deals between Great Powers to the detriment of other nations or at the expense of principle."

That the problem of seeking a possible understanding with Russia continued to pre-

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occupy the President was evidenced once more by his frustrated attempt early in October of last year to send Chief Justice Vinson to Moscow for the purpose—as he later explained—of securing Stalin's cooperation "in dispelling the present poisonous atmosphere of distrust." And a week later—speaking before the American Legion convention on October 18—he restated the American position on coexistence in explicit and ringing terms:

> Our policy is not now and never has been directed against the Soviet Union. On the contrary, we recognize that the peace of the world depends on increasing understanding and a better working relationship between the Soviet Union and the democratic nations. . . . We must remember that many a serious crisis has in the past been resolved without war. We must remember that the struggle for existence among nations, as among individual men, goes on all the time and expresses itself in many ways other than war. We must remember that rivalry among nations is an old story. History shows that rival powers can exist peacefully in the world. Patience must be our watchword.

It will be noted that, despite the strictures of the Truman doctrine and the policy of containment, there is even a hint at a possible area of legitimate competition in the above statement. In the course of his electoral campaign, the President repeated many times that he would seek understanding with all nations, the U.S.S.R. included. Even in his inaugural address, he pointedly summarized the struggles between democracy and Communism as a conflict between self-government, fundamental freedoms, peaceful change, and the assumption of the preservability of peace on the one hand, and rule by strong masters, absence of individual rights, violent change, and the assumption of the inevitability of war on the other. He concluded on the following hopeful note of ultimate understanding with the Soviet Union:

> In due time, as our stability becomes manifest, as more and more nations come to know the benefits of democracy and to participate in growing abundance, I believe that those countries which now oppose us will abandon their delusions and join the free nations of the world in a just settlement of international differences.

It will be remembered that soon afterwards, on February 15, Ambassador Jessup approached Soviet Representative Malik at the United Nations and began the conversations which resulted in the lifting of the Berlin blockade and in convening the June conference of the Council of Foreign Ministers.

Thus, as revealed in the pronouncements of the American government in recent years, the United States position can be summed up as follows:

1. The different political systems can live in the same world. War is not inevitable.
2. It is not so much the beliefs themselves but the actions which flow from the Communist ideology that threaten the efforts of free nations toward world recovery and lasting peace.
3. These actions have resulted in an excessive expansion of the territory and influence of the U.S.S.R. contrary to war-time and post-war agreements.
4. The United States feels particularly concerned over any further expansion of Communism by force and threats of force. The Truman doctrine, the Marshall Plan, the creation of a West German state, and the conclusion of the Atlantic Pact are designed to meet such danger by economic and military aid to the countries affected. These and similar measures, together with the work of the United Nations, will create the political and economic conditions on which a lasting peace can be built and the rule of law established in international affairs.
5. Russia herself will become more amenable when the above undertakings have brought about a high degree of international stability. The door is always open for serious negotiations with the U.S.S.R. in pursuit of an understanding on pending issues on the basis of the *legitimate* security needs of all concerned.

On the Soviet side, the pronouncements of recent years have painted the United States as the leader of imperialism, out to combat socialism and support reaction everywhere, to challenge Soviet interests in Eastern Europe, and encircle the U.S.S.R. with bases and military blocs. At the same time these pronouncements contain statements of belief in the possibility of "cooperation," by which is usually meant the restoration of economic relations.

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Perhaps more important for consideration here is the operative framework of Soviet foreign policy. It can be reduced for our purposes to half a dozen concepts or principles under the following headings: maximum security, minimum security, ideological competition, peaceful coexistence, balancing, and flexibility. The first principle comprises the idea frequently expressed by Lenin and restated in Stalin's well-known letter to Ivanov in February, 1938, that only a world-wide victory of Communism, replacing the "capitalist encirclement" of the U.S.S.R., will make socialism in the Soviet Union absolutely and irrevocably safe. The principle of minimum security embraces policies directed toward the primary goal of the survival of the U.S.S.R. It rests on the belief of the Soviet leaders that the mere existence of the U.S.S.R. would act as a force of example to the rest of the world, and it imposes upon Communists the duty and task to insure the preservation of the Soviet Union. The balancing and flexibility principles embrace the assumptions that the security and influence of the U.S.S.R. can be bolstered and expanded by exploiting the divisions and antagonisms existing in the non-Soviet sector of the world. It alternately employs both advances and retreats—freely adjusting actions, strategies, and tactics to the ebb and flow of opportunities in the foreign arena.

More difficult to comprehend are the two seemingly irreconcilable concepts of "ideological competition" and "peaceful coexistence." Stated in positive terms, the first concerns the idea that the Soviet ideology and way of life have a right to, and in the nature of things are bound to, compete with other ideologies in the world. Stalin formulated this concept as follows at the fourteenth Party Congress in December, 1925:

> The fundamental thing in this field [the field of international relations] is the fact that there is no longer in the world an all-embracing capitalism. . . . The world is split into two camps: the camp of imperialism and the camp of struggle against imperialism. . . . At the head of the lands of capitalism, place themselves two basic countries—England and America, an Anglo-American union. At the head of those who are dissatisfied with and are struggling unto death against imperialism, places itself—our country—the Soviet Union . . . . two fundamental but opposing centers of attraction are created, and correspondingly, in the entire world, two directions of gravitation: England-America for the bourgeois governments, and the Soviet Union for the workers of the West and the revolutionaries of the East. England and America attract with their riches, from them credits are obtainable. The Soviet Union attracts with its revolutionary experience, experience in the struggle for the liberation of the workers from capitalism and the oppressed peoples from imperialism. . . . Two camps, two centers of attraction.

At times this principle was expressed in practice in violent form—in support for revolutionary activity. At other times it has taken the form of propaganda and even of limited, sectarian type of activities. Its most recent assertion was made by Zhdanov—on the occasion of the formation of the Cominform—in September, 1947, when he spoke of "two major trends in post-war international policy corresponding to the division of the political forces operating on the international arena into two major camps," the "imperialist and anti-democratic" camp headed by the U.S.A. in alliance with Britain and France, and the "anti-imperialist and democratic" camp based on the U.S.S.R. and "the new democracies."

COEXISTENCE

In view of the claims of the above principle, the concept of coexistence sounds almost inconceivable. Nevertheless it is there. Stalin introduced it in fact in the very same speech in December, 1925, in which he formulated the principle of ideological competition. A certain balance of forces, he told the Party Congress, has emerged between the two camps. In place of the mere breathing spell which the U.S.S.R. had enjoyed before, there was now (in 1925) a whole period of respites, making possible a certain degree of "collaboration" between the Soviet Union and the capitalist world; in short, said he, a phase of "peaceful coexistence" has been entered into by the two camps and the Soviet Union was establishing "extensive, rich ties with the capitalist world along trade lines." The compliment and corollary of this principle was the concept of "socialism in one country,"

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i. e., the idea that it was possible and feasible to build socialism in Russia regardless of any revolutions elsewhere.

Two years later Stalin told an American delegation that, within the limits of the rivalry and struggle which goes on between the two systems, trade and diplomatic agreements are possible. In March, 1936, he told Roy Howard that "American democracy and the Soviet system can exist and compete peacefully, but one can never develop into the other." Again, with the mounting post-war friction, Stalin was asked by Alexander Werth in September, 1946, whether he believed "in the possibility of a friendly and lasting collaboration" of the Soviet Union and the Western democracies, despite the existence of ideological differences, and in 'friendly competition" between the two systems. He replied, "I absolutely believe so." And he gave similar answers regarding "coexistence" to Elliott Roosevelt two months later and to Harold Stassen on April 10, 1947, telling the latter that if cooperation between the two systems is established, there will be a greater exchange of ideas, news, teachers, and students "for an exchange of goods will lead to an exchange of people."

Lastly, we recall the "peace offensive" in the early part of this year in which Communist spokesmen called for international collaboration "on the premise that socialist and capitalist regimes can coexist," as well as Stalin's statement on May 17 that "the U.S.S.R. government considers that, in spite of the difference in the economic systems and ideologies, the coexistence of these systems and a peaceful settlement of differences between the U.S.S.R. and the U.S.A. are not only possible but also necessary in the interests of a general peace."

Thus, there is ample tribute to the principle of coexistence on both sides. And yet, one could almost repeat with the ancient prophet: "Peace, peace, but there is no peace." One fly in the ointment is the question of the duration of "coexistence." Another consists of the contradictory assumptions of the protagonists concerning the shape of things to come. There is an implicit denial of the permanence of coexistence in the persisting Communist postulate that the struggle of the two systems must ultimately lead to the victory of Communism by virtue of the self-destructive economic crises and wars bred by capitalism. Consequently, it would seem clear that a *maximum understanding* between East and West is impossible at this stage in world affairs. For a maximum understanding can mean only one thing—a conscious and deliberate undertaking to move without delay toward an agreement on fundamental values, to march in solid strides toward a common consensus on the role of the state and the rights of the individual, on economic welfare, race relations, the free movement of peoples, goods, and ideas in the community of nations. At this point, such an outright undertaking to bridge ideological differences would entail abandonment of a major article of Communist faith regarding the probable course of human events. That is not in the cards at present.

Whether we like it or not, therefore, ideological competition is likely to go on for a long time, although it need not necessarily be by force and threats of force. Under the circumstances, the very best that can be hoped for is a *minimum understanding* with Russia, i. e., the slow, mostly sporadic settlement of various practical questions which might lead to a subsidence of mutual recriminations and perhaps even to a gradual expantion of East-West trade. Essentially such a *modus vivendi*, if and when established, would stem from self-interest and correspond in nature and duration to the changing balance of power.

Whether a basis can eventually be found for a more solid and lasting understanding, time alone can tell. It is not a question whether the Soviet flexibility principle can ever be extended from mere tactical fluctuations to changes in fundamental dogma. While it would be reckless folly to expect such changes in the near future, it may be incorrect and perhaps politically unwise to rule them out for all future time. Rather it is a question of the clarification of potentialities through the crystallization of events. The U.S.S.R. is bent upon holding or improving its position in the balance of power, and is proceeding on the assumption that crises and antagonisms among the Western Powers will weaken the West and assure progress for Communism.

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The Western Powers seek a greater equilibrium of power vis-à-vis Russia, proceeding on the assumption that economic and military aid to countries threatened by it will contain Communism, and that in time stabilized conditions throughout the world will induce Russia toward genuine compromise. Thus, each of the protagonists in the struggle, convinced of its own impregnability, is waiting for things to take form. Under these conditions, time is the sole solvent. Progress toward a consensus on values could come solely under the impact of the lessons of time, only if a *modus vivendi* could be made to last long enough, perhaps as long as the next half century.

Time will almost surely show the Russians the falseness of some of their most cherished dogmas and conceptions about themselves and the rest of the world. Only time can demonstrate to them that the causes for their economic privations lie far less with their external environment than with the shortcomings of their own system. It could teach them something of the mounting strength and pursuit of social justice in the non-Soviet world, and might ultimately break down "curtains" and multiply contacts, for the human spirit cannot be permanently encased behind iron walls. The Russians are by nature extremely curious and impressionable people, and while at this stage cultural cooperation and ideological competition would not mix, it is inconceivable that—given time and a long peace—influences from the outside can be permanently barred. Only when a number of cardinal Soviet expectations have been disproved by unfolding life, will the foundation have been laid for a real understanding with Russia.

What is sometimes forgotten is that the West, too, needs time. The answer of the West to the challenge of our time is not to erect garrison states, but to make its house a fortress built on wisdom, justice, and unity. The waves of crises and revolutions predicted by Communist theory need not occur. Time should give the West a chance to prove whether it is capable of realizing its full strength, of integrating its communities politically and economically on a foundation of the basic freedoms and progressive living standards. And time should also make it possible for the awakened colonial and backward peoples to look and learn, to mold their lives, and find their affiliations in the world community.

The natural question which intrudes at this point is whether we shall have time. No one can know the answer with certainty. For the immediate future, there are at least three favorable aspects: the steady—although slow—progress of the United Nations, and America's desire as well as Russia's over-all need for peace. As for the more distant outlook, any search for optimism would have to rest primarily on speculation—and only speculation—concerning two possible considerations which may work a preference for a prolonged period of peace. In formula fashion, the first—which speaks for itself—may be stated succinctly as "coexistence is preferable to coextinction." The second would probably be summarized by its leaders under some such formula as "atomic energy plus time equals ultimate trump for Communism." It may be explained as follows: Communist dogma has long held out the vision of a future when the organization of society under a Communist order will have created optimum productivity and with it abundance and equality for all in material and psychological satisfactions. In drab contrast to this millenium, the Soviet people, largely by reason of lingering backwardness and low productivity, have undergone privations rarely witnessed anywhere else in the world. To the Soviet leaders, therefore, quite outside of any military value, atomic energy must look like the magic key which will finally unlock the doors of abundance and enable the U.S.S.R. to demonstrate to the rest of humanity the heights of achievement attainable under its system. In terms of time, such calculations could constitute an inducement toward a protracted peace.

In sum: the prospects for a maximum understanding with Russia are nil at present. A *modus vivendi,* however, actively or passively arrived at, is not altogether excluded. Only if it is permitted to last, if and when it is attained, will the chances improve for a genuine and enduring understanding.

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An analysis of America's role in the Pacific

The Lost Peace of China

By NO-YONG PARK
Author and Lecturer

WHEN the Communists raced to the northern bank of the Yangtze River last December, they stopped, looked, and pondered, for that wide, muddy river might prove to be their Rubicon.

As is well known to all students of China, the recent peace talk between the Nationalists and the Communists was not the first of its kind. The earliest peace conference between them was held in 1923 when Sun Yat-sen, the George Washington of China, was still living. In those days the Chinese Nationalists and the Russian Communists worked together against the Chinese warlords and the European imperialists. Largely through Russian influence, the Nationalists and the Communists were brought together. The Nationalists agreed to take in a small group of Communists, who had formed a party in 1921, on the condition that the Communists accept the Nationalist policies and principles. The Communists were more than glad to accept the terms of admission presumably just so that they could get into the Nationalist Party.

The coalition of the two parties thus formed worked satisfactorily for several years. Working together under Russian guidance, they almost succeeded in eliminating both the warlords and the imperialists. But on the eve of their victory in 1927, they split again. Who was responsible for that split?

The Communists have maintained that the Nationalists had been sold out to the Shanghai bankers and thus betrayed their Communist ally. This Communist version of the split has been accepted as a historical fact by the American writers and spokesman, most of whom, unfortunately, have played the role of Communist propagandists for a decade.

The Nationalists have contended, however, that the Communists had plotted a coup d'etat to assassinate the Nationalist leaders and to seize the sceptre of political power themselves. Chen Li-fu, who was then, as he still is, a key man in the Nationalist Party, told me an interesting story during my recent visit to Nanking. According to Chen, the Communists had worked secretly for the complete domination of China as early as March, 1926, fully a year before the ultimate split. To quote Chen:

> The Communists had plotted to assassinate Generalissimo Chiang Kai-shek and his assistants and to seize the power of the revolutionary government which was gaining momentum. A date for the assassination was set for March 20, 1926. On that day there was to be a riot in Canton, which was then the capital of the revolutionary government. The riot was to be staged by 4,000 armed laborers. In the midst of the turmoil, the Communist captain of Chungshan Warship, which was off Canton, was to bombard the Whampoa Military Academy to kill Chiang and his aides. We uncovered the Red plot through our secret service. We struck like lightning and seized the warship, arrested the ringleaders, and took over the key positions in the army and the government from the conspiring Communists.

Although it is difficult to tell which side was chiefly responsible for the initial split, judging from what the Communists have done to their allies in other lands, it is quite probable that they had conspired to seize the revolutionary government and failed because of the Nationalist detection of their plot. Whatever the actual facts of the case were, the formal split in 1927 was followed by a ten-year civil war.

Toward the closing days of that prolonged strife, Generalissimo Chiang Kai-shek was kidnapped in December, 1936, by Chang Hsueh-liang, who sympathized with the Com-

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munists. During his captivity at Sianfu, another peace talk between the Nationalists and the Communists was held. Both sides agreed to end their internecine warfare and to stand together for national unity against the Japanese. The formation of this new coalition precipitated the Japanese attack on China in July, 1937.

In the first year of the war, the Communists and Nationalists fought side by side against the invaders. But following one defeat after another, they blamed each other for their reverses and split again into two hostile camps. When Japan collapsed under the impact of the atom bomb, both sides rushed for the seizure of the lands which had been held by the Japanese army. As a result, an open clash of arms developed. George Marshall then arrived on the scene to make peace between the rival factions.

COMPROMISE

In the early stage of his mission, Marshall was remarkably successful. He succeeded in making a truce between the two armies and moved rapidly toward the making of peace. He was very patient, tactful, and resourceful, but he found the winning of the peace in China much more difficult than the winning of the war in Europe. After laboring nearly a year, Marshall returned home, disgusted and empty handed. He blamed the reactionary elements of the Nationalist Party and the extremists of the Communist Party for the failure of his peace mission. But there were three main reasons for the failure, all of which were overlooked by Marshall. The first was the deep-seated fear and suspicion accumulated in years of civil war. The second was the uncompromising nature of the Communists. The third was the failure of the United States to secure Russian cooperation in the making of peace in China.

In any country where the political factions have fought so long and so bitterly as the two parties have in China, hatred, jealousy, fear, and suspicion make it impossible for them to make peace in good faith and to work together like brothers. Every word and act of the other faction is taken as a treacherous gesture. The very idea of talking about peace is taken by both sides as a sign of weakness or of trickery. There can be no compromise peace between such hostile groups; the only peace that is possible is the peace of the victor imposed upon the vanquished.

Furthermore, the Communists, as we now know, are not the kind of people who make a compromise peace with their enemies. The very idea of making peace between the Chinese Communists and the Nationalists on Marshall's compromise formula was foredoomed to failure.

At that time, the Chinese Communists were represented abroad as mere agrarian reformers, not Marxian Communists. But the very fact that the so-called "experts" in the American government swallowed that Red propaganda and acted on that assumption betrays a complete misunderstanding of the true nature of the Chinese Communists.

It should be admitted that even the Communists have at times made a compromise peace with their enemies, but only as a means of getting into a position from which they can embarrass their opponents and eliminate them. What they did in Poland, Czechoslovakia, and other states in Eastern Europe is proof of what they would have done in China, had Marshall succeeded in making peace between them and the Nationalists.

Despite the uncompromising nature of the Communists and despite the deep-seated fear and suspicion between them and the Nationalists, some sort of compromise peace, even though a temporary one, might have been imposed had the United States and the Soviet Union jointly brought pressure to bear upon the warring factions. But they were split into hostile camps themselves and failed to cooperate in the making of peace in China as elsewhere.

In the midst of the peace negotiations in China, Joseph Stalin declared on February 9, 1946, that the honeymoon between Russia and the Western Powers was over and that Russia must introduce another series of Five-Year Plans to prepare for war on the capitalistic countries. It was actually an open declaration of war on Russia's erstwhile allies and an official command to all Communists the world over to break with their allies and to fight for ultimate domination.

The open split between Russia and the Western Powers gave the warring factions in China, as well as in Korea, Indonesia, Indo-

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China, and other countries, the hope of gaining outside aid to crush their enemies. When there was such a prospect, even a remote one, they refused to make further concessions for a compromise peace. So Marshall's mission ended in complete failure.

When Marshall attempted to make peace, the Nationalists, because of American aid given during the war, were stronger than the Communists. But since then the Communists, largely because of Russian aid, have grown progressively more powerful. As a result, the Communists defeated the Nationalists and gained control over all North China divided by the great Yangtze River.

In the face of this sweeping Communist victory in North China, accompanied by a general demoralization in the Nationalist camp, Generalissimo Chiang Kai-shek made an offer to make peace with the Communists in his New Year's message on December 31, 1948. He said he would retire from politics, if necessary, for the sake of peace. He declared: "If peace can be secured, I am not at all concerned about my own position. In this I will follow only the consensus of the people." But he laid down the minimum conditions of making peace:

> If a negotiated peace is not detrimental to the national independence and sovereignty, but contributes to the welfare of the people; if the Constitution is not violated and constitutionalism is preserved, the democratic form of government is maintained, the entity of the armed forces is safeguarded, and if the people's free mode of living and the minimum living standard is protected, then I shall be satisfied.

COMMUNIST DEMANDS

The Communists denounced Chiang's offer for peace as a "trick," and on January 14, 1949, their leader Mao Tze-tung made a counter proposal which was tantamount to demanding an unconditional surrender. Mao declared he would consider negotiating peace if the Nationalists would accept the following eight demands:

1. Punish war criminals. The Communist list of war criminals published in December, 1948, included 45 Nationalist leaders.
2. Abrogate the Constitution which was adopted by the National Assembly at Christmas, 1946, without the Communist participation.
3. Abdicate the ruling power of the Nationalist Party. Although it was not stated clearly, under this provision the Communists would eventually abolish the Nationalist Party and all other parties.
4. Reorganize the revolutionary armies in accordance with democratic principles, meaning the establishment of a complete Communist control of the national armed forces.
5. Confiscate bureaucratic capital held by important figures either in government or with government connections.
6. Reform the agrarian system.
7. Abrogate the treaties of national betrayal which, according to the Communists, include the agreements betwen China and the Western Powers, mainly the United States, but do not include those between China and Russia, giving the latter a paramount position in Eastern Asia.
8. Convoke a political consultative conference without the participation of the reactionary elements, establish a democratic coalition government, take over all power from the Nanking Kuomintang reactionary government and its lower levels of government. This, in short, means the creation of a complete Communist dictatorship over all China.

It is obvious to all that the acceptance of these Communist demands would mean an unconditional surrender by the Nationalists and would make the Chinese Communist Party as powerful in China as the Communist Party is in Russia. The Nationalists were willing to make peace at almost any price, but not on such terms. The Communists, however, would not consider stopping their war for anything less.

The stiff Communist demand for peace backed by their powerful army split the Nationalists into two camps: those who recognized the utter futility of continuing the war and were willing to make peace at almost any price and those who knew the Communists too well to hope for making peace on satisfactory terms and wanted to continue the struggle to the bitter end. The former was represented by Li Tsung-jen and the latter was led by Chiang Kai-shek.

As the situation grew more hopeless, the peace-at-any-price group gained the upper hand. Generalissimo Chiang stepped down on

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January 21, 1949, and Li Tsung-jen came in as an Acting President to make peace with the Communists.

From the very start, there was little prospect for President Li to make peace on any other terms than unconditional surrender. He did all he could to make peace with the patience and tact of George Marshall, and the Chinese spirit of humility. He told the victorious Communists that he was ready to be "boiled in oil" for the sake of peace. He begged and prayed in the humblest classical language to cause the Reds to soften their harsh terms of peace. But the more he prayed, the harsher their terms became. After three months of begging and petitioning, the original eight demands became 24!

PRESIDENT LI

It is a fact that the Communists modified their demand for the punishment of war criminals. At first, they insisted on punishing practically all the leading Nationalist leaders as war criminals. But finally, they modified this demand by stating that the civil and military officials of the Kuomintang "will be welcomed by us no matter who they are, provided they will differentiate clearly between right and wrong, earnestly repent, and really show it with deeds, thus favoring the progress of the cause of the People's Liberation and favoring a peaceful solution of the domestic questions."

What actually broke up the so-called "peace" negotiations was the Communist demand for an unopposed crossing of the Yangtze River and the reorganization of the army and government under Communist control as a precondition for holding a peace conference. In other words, the Communists wanted to get what they wished by using the peace conference as a bait.

President Li Tsung-jen refused to accept these "preconditions" by stating that they were not mentioned in Mao's original eight points. He expressed his earnest wish that the Communists would make peace on the basis of their original eight demands. The Communist reply was their ultimatum of April 17, demanding the acceptance of those preconditions in three days. On the nineteenth, Li turned down the ultimatum, and on the twentieth, the Red Army swarmed across the Yangtze River.

The Nationalists were helpless in the face of the Communist onslaught. Their armed forces were ill-equipped and demoralized. Their finance and economy were bankrupt and ruined by long years of devastating war. They were demoralized and disheartened by their failure to obtain more American aid on which they had pinned their last hopes. Above all, they were split from within and were unable to make preparations for defense. All they could do was what they did before the Japanese army—run.

Although the cause of the Nationalists seemed hopeless, Generalissimo Chiang Kai-shek reaffirmed his faith in the final victory against Communism. Reappearing from his three-month's "retirement," he declared on April 27 that the Reds sealed their own doom when they crossed the Yangtze River. He said that the Communists like the Japanese would run into such insurmountable political and economic difficulties that they would collapse in about three years. He reiterated his determination to continue the struggle until the outbreak of World War II when the United States will come to his rescue.

His faith in the final victory against the Communists was echoed across America by Claire L. Chennault. He said that the Nationalists can hold out against the Communists as they did against Japan in what was Free China during the war, if America could extend to them substantial miltiary and economic aid. The stand taken by Chennault was warmly supported by many Senators and Congressmen of both parties. But the Truman administration was unalterably opposed to considering any measure which would aid the Nationalists.

On the contrary, while the Nationalists were fighting the Reds with their backs to the wall, the State Department issued the White Paper on China on August 5, 1949. In it, the State Department made a blistering attack on the Nationalists, as if it had intended to help the Communists to deliver their final knockout blow. The critics of the administration immediately opened their attack on the Truman administration. They have charged that the present administration has brought about the Communist victory through its own

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blunders and stupidity and issued the White Paper to cover up its own failures.

To support their charges, the critics of the administration have maintained that, by concluding the Yalta Agreement, giving Russia a paramount position in the Far East at China's expense, the United States actually underwrote the present Communist victory in China. They have maintained further that the State Department swallowed the Communist propaganda that the Chinese Reds are mere agrarian reformers, and consequently, it forced the Nationalists to make peace with the Communists when they were strong enough to crush the Reds. They have also brought out the embarrassing fact that, when the Nationalists were slow in making peace with the Communists, as advised by the United States, the State Department enforced an arms embargo against the Nationalists for 16 months. At that very moment, the Russians were arming the Chinese Communists with Japanese weapons and American arms given Russia during the war under Lend-lease.

The administration critics have likewise charged that the State Department falsified the amount of aid given the Nationalists to disclaim responsibility for its failures. They have pointed out that the actual military aid to the Nationalists since V-J Day amounted to only $110,000,000, instead of two billion dollars, as claimed by the State Department. In making a detailed analysis of the claims made by the administration, the critics have pointed out that the State Department claimed to have sent $95,000,000 worth of tanks and vehicles when it actually sent only $5,000,000 worth of such materials.

While the politicians in Washington were busily engaged in finding a scapegoat for the crisis in China, Generalissimo Chiang Kai-shek, leader of that toppling Nationalist government, sought to form an anti-Communist pact in Eastern Asia. He persuaded President Syngman Rhee, of Korea, and President Elpidio Quirino, of the Philippines, to enter into such a pact. But the movement did not have American support.

A few thinking Americans feel that the United States should adopt an Asiatic policy based on the same principles as the Marshall Plan and the North Atlantic Pact. But the Truman administration shows little interest in adopting such a policy. President Quirino visited President Truman on behalf of his Asiatic colleagues and discussed the subject face to face. He was given a courteous and warm reception. But that was about all he got.

As the United States is the only nation which can assume leadership in the battle for democracy either in Europe or Asia, no anti-Communist movement can be expected to be a success without her. The continued failure of the United States to assume an active leadership in the Pacific affairs, therefore, will probably insure the Communist domination of all Asia.

One joke they are telling in London is inspired by the big money some dentists are making off the government health plan:

"My dentist had an awful accident."

"What happened?"

"He fell off his wallet!"—*Memphis Commercial Appeal*

To General "Black Jack" Pershing our ill-starred expedition against Pancho Villa was a disagreeable and unrewarding affair. One day when things were not going very well, the General met with a party of newspaper reporters and explained the progress of the campaign as cheerfully and as optimistically as he could. But it was plain that his heart was not in it.

At this point a grizzled old scout elicited a hearty laugh, not only from the newspaper men, but from General Pershing as well. Breaking a long, solemn silence, he observed: "As I figure it, General, we've got Villa entirely surrounded —on one side."—*Wall Street Journal*

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The pattern of the emerging system

An International Economy?

By LAURENCE DE RYCKE
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TWO years ago, Secretary of State George Marshall made his now famous speech at Harvard in which he suggested what has since become the European Recovery Program. The familiar "E.C.A." is now the most important component of this government's foreign aid program. According to President Truman, American assistance has stopped "the disintegration of the democracies of Europe" and "turned the tide in favor of freedom and peace." Mr. Paul Hoffman, the E.C.A. Administrator, credits his agency with having "stopped the march of the Kremlin to the Atlantic Ocean." Others have described the E.C.A. program as "something which has not happened to Europe since the Holy Roman Empire." Such enthusiastic appraisal makes it difficult to understand why Mr. Hoffman, whose magnificent record as E.C.A. Administrator is everywhere acclaimed, should feel it necessary to say that he would resign if Congress reduces E.C.A. funds to a point where he is convinced the program cannot be continued successfully.

President Truman, in his Little Rock speech of June 11, 1949, made obvious reference to those who would cut the E.C.A. appropriations when he remarked:

> There are voices which claim that because our policy has been successful so far, we can now afford to relax. There are some who want to slash the aid we are giving to the economic recovery of other nations; there are some who want to reject the measures that are necessary for defense against aggression; there are some who wish to abandon our efforts toward the arrival of world trade. These are the same voices that misled us in the 1920's. They are misguided by short-run considerations. They refuse to face the plain facts. They try to convince us that we cannot afford to pay the price of peace.

These remarks of the President are significant. If one reads them carefully, it is clear that he believes that the price of world peace involves American participation in a variety of programs ranging all the way from foreign aid and the revival of world trade to military defense. It is questionable whether the majority of Americans will accept the President's statement as fair and defensible on faith alone. It is the purpose of this article to furnish a background of fact and theory against which the President's statement can be evaluated.

What are the facts which may be marshalled to assess the validity of the President's position? History, if it is of any practical use whatever, should be of help here. If one examines the sordid story of how man has butchered his neighbors when they did not agree with him, or, indeed, for any discernible reason whatever, it is clear that the century most free from the blight of war was the period from 1814 to 1914. Even this span of years encompasses our own bloody Civil War, but relatively speaking, this century was a century of peace. It was also the century during which mankind made its greatest material progress. At the opening of the century, it took Napoleon as long to communicate with Rome as it had taken Julius Caesar to communicate with Paris almost two thousand years earlier. At the close of the century the telephone, the telegraph, and the wireless had made the transfer of information almost instantaneous. Similarly, the Industrial Revolution which began in England in the latter part of the eighteenth century, despite its admitted social injustices, made possible unprecedented increases both in the number of people and in their standard of living. Despite heavy emigration, the popula-

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tion of Europe more than doubled between 1800 and 1900. At the close of the century, the average citizen of a western democracy lived and ate better than did most princes two centuries before. People really believed in Adam Smith's "obvious and simple system of natural liberty." Costs were flexible, there were few impediments to the transfer of either people or materials between countries, and markets were considered to be self-regulating. The "automatic" gold standard flourished under these conditions. The "liberal" state was everywhere acclaimed. These were the criteria by which a nation was classified as "backward" or "progressive."

It would serve no useful purpose to enter into the discussion as to whether the hundred years of peace was a cause or an effect of the material triumphs achieved during the nineteenth century. Such formalism belongs to the solution of lesser issues than face us here. It is enough to observe that material progress, freedom, and peace all existed at the same time. We may never know exactly why. But there is an increasing number of students who believe that economic and political progress and peace are all interrelated components of one whole, the removal of any one element of which will destroy the entire structure.

It is easy to fall into the fallacy of believing that the nineteenth century was a utopia full of blessings for everyone. It is perfectly true that both production and consumption reached unprecedented heights during that period. But it should also be remembered that the nineteenth century was rife with grisly conditions, especially for the underprivileged, which would not be tolerated today. Even if it were everything that some would have us believe, it remains "a country from whose bourn no traveller returns." The nostalgically inclined, those who would go back to the "good old days", have committed some of the most serious errors of our generation. One example must suffice. There were those during the 1920's, and they include many of us, who believed that most of the desirable characteristics of the nineteenth century could be restored if the gold standard were re-established. They made the mistake of identifying the gold standard with the conditions which made its operation as an effective instrument of cost and price regulation possible. By the 1920's, costs and prices had become more rigid than they were in the nineteenth century. There was more government regulation of business; labor was better organized and not disposed to give up any of its hard won gains. The impediments to the movement of materials and people between countries had become more effective. Monopoly had done much to eliminate the self-regulating market system of the classical economists. There was a growing suspicion that Adam Smith's system was not revealed truth capable of solving all problems in the best interest of everyone. A few years later this suspicion became a conviction. In the face of all these changes, the gold standard was reintroduced. The wonder is that anyone was surprised when it failed to operate successfully. The thinking was based on memory, not a realistic analysis of existing conditions.

But even if the conditions of the nineteenth century cannot be reproduced, it does not follow that history has nothing of value to teach the careful student. To understand the methods which the great minds of the past used in solving their problems is of prime importance because, properly applied, they may be useful in the solution of our problems today. It is the solutions of the past that are almost always dangerous. The untrained are too often bewitched by them. They act as though they believe that a successful solution to a problem can be used like a cookie cutter to stamp out, on demand, workable answers to other problems, however dissimilar.

A careful reading of the history of the nineteenth century clearly reveals that the economic and political system which made the material progress during that period possible had its foundations in the teachings of the great minds of the Age of Reason. These teachings included, among others, that freedom under law for the individual is the only morally justifiable foundation for a civilized society; that the highest possible standard of living for everyone is a legitimate goal for economic activity. This goal can be achieved most quickly and cheaply by encouraging conditions under which each individual can apply himself to those tasks where he has the greatest natural aptitude.

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He can then produce the greatest quantity of goods or services of the best quality with the least effort, and exchange his specialized product without restriction for the items he wants or needs but does not or cannot produce for himself. For example, more shoes will be available for everyone if those who make shoes cheapest and best do nothing but make shoes and trade their product for food, clothing and furniture, which are, in turn, produced by the most efficient producers. This reasoning is unassailable even today. But to put it into practice will require a different set of institutions than those prevalent in the nineteenth century because the circumstances within which the objectives can be reached are so radically different. The problem may be compared to the task of a bridge builder. The goal in the ninetenth century and today is to reach the other side of the stream. But the materials with which to construct a bridge to span the stream have changed. The manner in which the bridge is constructed, perhaps even the nature of the structure itself, in all likelihood, will have to be quite different.

What is the method by which we are seeking to achieve freedom for the individual, a higher standard of living for all, and world peace within the framework of conditions as they exist in 1949? Perhaps the easiest place to start an analysis of this problem is to examine the E.C.A. The E.C.A. program was designed to help Europe to help itself regain a position where it can again earn its own way. Europe is this country's best customer. Its productive facilities were seriously disrupted by the war. It can buy our goods and services only if it can earn dollars first by producing items for export and secondly by selling them to obtain dollars. If Americans are interested in a world in which their economic and political ways of life have a chance of survival, then Europe, which is the most important single foreign trade unit in the world, must again have its chance to produce and exchange, to buy and sell in the world markets.

But business managers, wherever located, do not make the longe-range plans necessary to modern production. They do not purchase materials and machinery, and hire labor to produce an article unless they are reasonably sure that the items produced can be ultimately sold at a profit. To insure such conditions it is necessary, among other things, that the businessman be reasonably sure that no extraordinary changes will take place, while his goods are being produced, in the purchasing power of the money in which he deals, in the nature and extent of the tariff and other barriers which other countries impose against the entry of his goods, in the political stability of his government and the governments of the countries in which he wishes to buy and sell, and in the possibility of foreign invasion. Businessmen have always shown a surprising ability to deal with impediments to trade, however severe, if they are known. The one thing they cannot cope with is uncertainty.

E.C.A.

The speed with which European production facilities have been brought back into effective operation is a tribute to the efficient administration of the E.C.A. as well as to the courage and industry of the European peoples. Something also has been accomplished to slow down the inflationary spiral in Europe. Much more needs to be done, but a significant start has been made. The E.C.A. likewise has had some success in encouraging an expansion of intra-European trade. Increased political stability may be expected to accompany economic stability. The E.C.A. has not, however, been able to assuage the fears of the legitimate European governments in regard to the Communist menace. America's ratification of the Atlantic Pact would do more than any other single thing thus far advanced to create that peace of mind in Europe which is necessary for significant economic progress.

If it were possible to re-establish the standard of living which was prevalent in Europe before World War II, by achieving the volume of intra-European trade which existed at that time, the task would be relatively simple. It could then be argued that the President's remarks concerning world trade had restricted applicability to the problem. Unfortunately that is not the case. Europe is a huge specialized factory which imports foodstuffs and raw materials from the ends of the earth and sends forth its fabricated products in payment. It is for that reason

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that the General Agreements on Tariffs and Trade signed at Geneva in 1947 and the I.T.O. are of importance. The Geneva agreements achieved a significant reduction in the barriers to world trade.

The I.T.O. seeks to establish a kind of rules of the game, so to speak, by which the trade of nations shall be conducted. Those Americans who regard imports of European goods, particularly those which compete with goods produced here, with something of a jaundiced eye, should ask themselves of what possible use it is to assist Europe or any other area to recover its productive powers if the factories, mines, shipyards, once again in operating order, cannot sell what they produce at a profit? If our answer is that the products should be sold elsewhere but not here, then we should ask why competition is considered to be "the American way" when engaged in by Americans, but it is not the American way when the competitors are foreigners. Why should products produced beyond salt water make the difference?

If fear of foreign aggression can be assuaged by the adoption of the Atlantic Pact, and the I.T.O. is ratified by our government, much will have been accomplished that is absolutely essential to Europe's rehabilitation. But something more is necessary. There must be, as quickly as possible, free convertibility among the various currencies. If a European businessman can secure dollars with which to make purchases in this country *only* by selling his goods here, then his market is distinctly restricted and his ability to buy and sell, to create a larger volume of business, is accordingly curtailed. But if he can sell his goods in any market however distant, receive payment in the currency of that country, and then exchange that currency for dollars, the volume of his purchases and sales can be expanded many fold. Reducing the barriers to trade and opening the markets of the world to businessmen everywhere would be a shallow gesture indeed if currencies were not convertible. During the nineteenth century the international gold standard performed this function efficiently. The modern counterpart of the gold standard is the International Monetary Fund which was created primarily to lend stability to the international exchanges and to encourage free convertibility at the earliest possible moment.

It should be obvious from these brief observations that the E.C.A., the Atlantic Pact, the I.T.O., the G.A.T.T., and the International Monetary Fund are all essential interrelated parts of a growing pattern which is being designed to facilitate the reconstruction of world trade, to create a climate in which individual freedom and initiative may not only survive but thrive, and to make world peace a realistic possibility. If it were possible to deal adequately here with all aspects of the pattern, other agencies should be included, especially U.N.E.S.C.O., the International Bank for Reconstruction and Development, and the American Trade Agreements Program. It is legitimate to criticise many of the activities of these agencies as sheer waste motion. That is an administrative deficiency. But it is not possible to attack the validity of the purpose of these various agencies if one desires the reconstruction of the kind of economic and political world in which we Americans will find it possible to continue our way of life.

During the next ten years at least, what this country chooses to do will determine in large measure what the rest of the world finds it possible to do. If the interrelated program discussed in this article is to have an opportunity to succeed in its fundamental task of achieving world peace, it needs the understanding and active support of every American.

"What does the expression, 'Sez you', mean?" asked the British judge.

The Clerk of the court replied:

"My lord, it appears that this is a slang expression which has gained regrettable currency in the language of our people through the invidious agency of the cinema, and is, as I am led to understand, employed to indicate a state of dubiety in the mind of the speaker as to the veracity or credibility of a statement made to him."

"Oh, yeah?" said the judge.—*Catholic Mirror*

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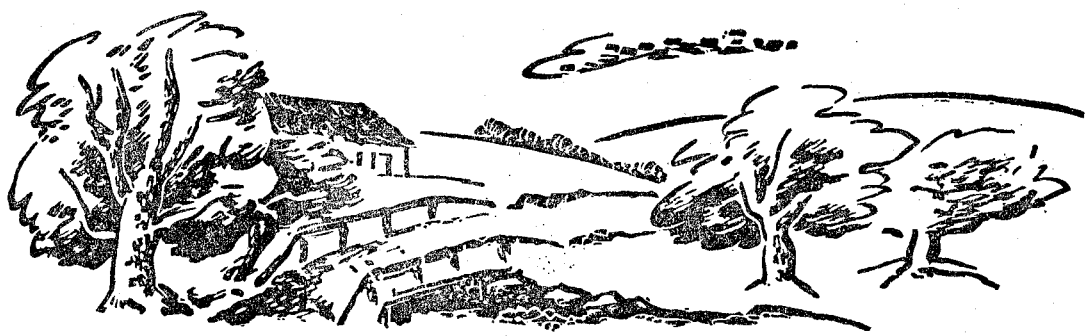

COUNTRY COMMENT

Happy the man who not only eschews evil and embraces good but who knows how to transmute evil into good. If "evil" and "good" sound too theological and disputatious, then say Happy the man who knows how to change the minus signs to plus. A symbol of this transformation is the Nantucket Knot.

The Nantucket Knot is a way of converting old newspapers into something that burns almost as well as wood. At the same time that you are getting rid of something you want to get rid of, you are making something that will contribute to your warmth, your cheer, and your economy.

Lay about ten fully-spread sheets of newspaper on top of one another, and, starting at a corner, roll them diagonally with the aim of getting as long and slender a tube as possible. Bend the tube at the center until the two ends cross. Then force one end over and into the loop far enough so that it holds; then force the other end over and into the loop likewise. The result is a sort of double bow-knot.

The function of a Nantucket Knot, obviously, is not to serve as back-log to a fire. It is not equivalent to a stout stick of birch or hickory. Neither is it good as quick kindling for starting a fire. It mediates between these two extremes. It is best thought of not as a substitute for wood but as a complement. It ekes out the wood you have and makes it burn better, especially if after the first pleasant blaze your fire begins to falter. The shape of the Nantucket Knot is such that when inserted between two logs it holds them apart to allow air to circulate; and it keeps its own form and substance long enough to be more than a momentary expedient. Though it ignites more quickly than wood, it burns with something of wood's endurance. Mystically and metaphysically it is paper returning part way to the wood from which it came.

Some of my friends, rolling Nantucket Knots in front of my fireplace and then watching them burn, have speculated on the comparative merits of various newspapers. Do some burn better, brighter, and longer than others? I cannot say for certain. But I am in a position to affirm the excellent burning qualities of *The New York Times*. How clean and satisfying a way for a newspaper to end its life! How blessed a transubstantiation of the news of yesterday into the clear flame of today! Though *The New York Times* burns excellently from a physical point of view, I could easily believe that from the point of view of journalism some other papers would burn still better.

What I said at the beginning about the transformation of evil into good may seem far-fetched. Granted that the Nantucket Knot is a good, both practical and symbolic, did its goodness come out of any evil? All I can say is that anything that clutters up one's life is an evil.

But why Nantucket? It seems that firewood on the island is scarce since there are relatively few trees. But what the people of Nantucket lack in trees they make up for in newspapers and in Yankee thrift and ingenuity.

Here where I live, firewood is not scarce, yet it is as costly as if it were. Pound for pound, even here in the wooded country, the Sunday *Times* is something of a bargain.

ROBERT FRANCIS

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JASPER R. LEWIS

Books in brief

We are so much bombarded by cannoneers on the extreme right and on the extreme left that an exposition of the middle course—the American way—seems to refresh the reader and replenish his optimism. Ralph Barton Perry in *Characteristically American* (Knopf, $3.00), summarizes his views on American philosophy. Long a philosopher and a professor at Harvard, he writes in this book for the lay reader, with keen insight and a sense of humor. Some of it seems only the putting into words of the ambiguous thoughts most Americans have about their country. A little of it is summarization of the philosophies of Emerson, John Dewey, and William James, as contradicted or confirmed by the march of events. All of it is reassuring to the adult who is able to think logically about the world he lives in.

Recognizing that Americans are descendants of numerous nationalities, Perry sees a common Americanism, even if it is indescribable. "The melting pot has not merely melted: it has cooked a broth with an unmistakable flavor of its own." This Americanism lies in the values held in common. The development of the nation from its break with England, with the social and institutional characteristics of the mother country modified by revolt, resulted in a type of mentality accustomed to a collective "individualism." We like to be joiners, but we also like to rise by our own efforts. Despite occasional setbacks, we still believe there is room at the top, or on the way up.

Perry diagnoses some of our weaknesses with a fatherly understanding. We may be licked, but we expect to fight another day. We see no sense in unhappiness or accepting pain or poverty. "Even sin is regarded as curable; if not by divine grace, then by psycho-analysis." The national devotion to sports, exemplified by college football, while it is partly commercialized, is a symbol of our desire to win. "Going to college" for more intellectual purposes is a similar indication of the American way. Our vulnerability to high pressure advertising, to bigness, to the comic strip or soap operas is a part of our mores. Our critics expose our faults, but we recognize them as American, and do not hide them. We even glory in them a bit.

The development of American thought, with the influence of religious beliefs and the nineteenth century philosophers, is highlighted by a chapter on William James, in many ways the outstanding exponent of Americanism as Perry sees it. This brief study of James, his work and his ideals, exemplifies also many of the comments and views of Perry.

As for the American religious heritage, it is based on traditional Hebraic-Christian-Biblical beliefs, the Christian beliefs including Catholic and Protestant. This chapter, incidentally, is an excellent example of tolerance, containing the basic moral teachings of all three religions, and showing their influences on our way of life. Perry discusses the question of whether Catholic philosophy fits in with Americanism or opposes it, and finds that "Catholicism is uncongenial to Americanism in its authoritarianism" and other tenets, while it is congenial "in its insistence on the priority of moral principles to the civil law" and other principles.

The meaning of democracy as it is understood in America, the relations between its political and social aspects, the several schools of thought, whether of Jefferson or John Adams or others, are shown as different aspects of our philosophy, changing with the times. The growth of governmental intervention in private business as protection for workers against monopoly or big industry is part of democracy, and saw its high water

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mark (to date) in the New Deal of F. D. R.

There are numerous phrases which aptly describe Perry's thoughts, and should not bloom unnoticed. Trust in God does not mean leaving it to God. "Not 'God wills,' but 'I will, so help me God,'" is one. "Freedom to think . . . . underlies all other freedoms" is another. And it is all quite well summed up: "Democracy suits America eminently well. American democracy does not run smoothly; at best it flounders and lunges ahead. But it suits a people who are neither a mechanism nor an organism, but a collection of mobile and distinct individuals who know how to organize themselves as the task may require."

BRIEFER COMMENT

GENERAL INTEREST

William Feather, columnist, writer, and printer of house organs, celebrates his sixtieth birthday by assembling a book full of epigrams and thumbnail essays. *The Business of Life* (Simon & Schuster, $3.50), is a treasure chest of plain talks, homilies and wise thinking. Feather has a deft touch. In his Foreword he confesses that the bulk of his fans pick up a book in the hope that they may soon be asleep. He includes some kitchen recipes he has used. Some of his sketches are rather dry, but there is a world of philosophy and humor in most.

The Art of Readable Writing, by Rudolf Flesch (Harper's, $3.00), is intended to be a practical guide on how to write intelligible English and how to avoid complicated or confused word arrangements. Flesch is less interested in grammar and rhetoric, and more in practical language that will fulfill its function of conveying thoughts. With examples and quotations, he illustrates the good and the bad in composition, gives hints on simplification of style, and in general offers a helpful guide particularly for young writers.

Edward Ellsberg commanded the salvage forces charged with the task of keeping Allied ships afloat during and after the North Africa invasion in 1942. *No Banners, No Bugles* (Dodd, Mead, $4.00), is the saga of the men who did the work. It is the narrative account of individual incidents, told in detail with thrills and dry humor, and has an informality between the officers and crew that might not be Navy but makes for excellent reading.

The Miracle Drugs, by Boris Sokoloff, M. D. (Ziff-Davis, $3.00), is the story of newer drugs, the antibiotics, their discovery, development, and uses. Dr. Sokoloff starts with Pasteur and runs through the details of each find in generally non-technical but direct descriptions. Photographs of the discoverers and their equipment add to the interest. There is no attempt to glorify or to overestimate the achievements to date.

The history of the growth of union power in the automobile industry is told quite bluntly in *The U. A. W. and Walter Reuther,* by Irving Howe and B. J. Widick (Random House, $300). In fact, the authors, even though favoring the union, have made the story a dramatic unfolding of organization triumphing over too-rugged individualism and one-sidedness. Ford's peculiarities and his eventual defeat by the U. A. W., the sit-down strikes, the Negro question in labor, and the general success of the union are related without bombast, if from the union's viewpoint. Reuther's position in the U. A. W., his personality, ideas and strategy, are explained and supported. The need for political action in labor circles is also endorsed.

A little book of articles and addresses by Albert Einstein, *The World As I See It,* translated by Alan Harris (Philosophical Library, $2.75), omits the scientific side and confines itself to those pronouncements that tend to show Einstein's philosophy about life. These include comments on politics, principally European, the Jews in Europe, and about numerous personal friends and problems. The volume is an abridged edition of the original, which also contained chapters on relativity.

The political progress of James Michael Curley, of Boston, is reported in *The Purple Shamrock,* by Joseph F. Dinneen (Norton, $3.75). Born of poor Irish immigrants, Curley's rise to the mayoralty of Boston and

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the governor's seat, his victories and defeats, and above all his pull on the Irish electorate of his city are matters of national interest. Dinneen knows and records Curley's political devices and attitudes; in fact, once Curley sued him for what he had written earlier. Some light on national politics is shed through incidents in Curley's career. The present book is entertaining and at times delightfully so, and pictures a type of politico that is fast disappearing.

For handy desk use the *American Everyday Dictionary,* edited by Jess Stein (Random House, $1.00), is for the student or general reader not requiring a more comprehensive work. It has over 60,000 entries, and is based on the same publisher's American College Dictionary. It contains a guide to correct grammar and a rapid vocabulary builder.

Women Are Here to Stay, by Agnes Rogers (Harper's, $5.00), pictures "the durable sex in its infinite variety through half a century of American life." It is in large format, with over 500 photographs and 38,000 words. (I didn't count them.) The fetching title is justified by the nostalgic illustrations of notable people and events, with a wide selection of subjects from Mrs. Astor to Gypsy Rose Lee.

FICTION

The Happy Generation, by Ferenc Kormendi (Crown, $3.50), is one of the lengthy European type novels, dealing with the development of a Hungarian from boyhood to maturity. The aftermath on Hungarian life of World War I, the psychological upsetting of the generation of youth, show their effects on society through the tribulations of the characters. Its language is more conservative than our own popular novels. Despite its occasional lapses into monotonous detail, it makes a worthwhile and interesting book.

The first half of *The Wolfshead,* by Jere Wheelwright (Scribner's, $3.00), is as romantic and swashbuckling as Dumas, and as entertaining. It is the story of John Aumarle, Earl of Bristol, and the two Marys, Tudor and Scottish, with a good bit of the court of Henri II of France. The second part is a let down in excitement, possibly because the lesser figures assume the greater part of the stage. As light fiction it is still good.

A Sea Change, by Nigel Dennis (Houghton, Mifflin, $3.50), reflects the mixed emotions of a young American writer caught up in the recent European embroilment as a correspondent. This reader somehow lost interest in the supposedly central figure, who seems both overdrawn and distasteful, and found more real life in the lesser characters.

The great American worship of college football is rudely attacked in *The Hero,* by Millard Lampell (Messner, $3.00), with a protagonist "scouted" from truck driving to become a gridiron star. College life, with its big moments and its pettiness, a youth's earnest desire for education, and above all descriptions of football tactics, make up a modern Frank Merriwell. Interesting in a melodramatic way, not overlooking the rough stuff in the football clashes.

Rafael Sabatini has a fairly interesting story to tell in *The Gamester* (Houghton, Mifflin, $3.00). It is the tale of John Law, financial wizard exiled from Scotland, and his rise to power at the court of France after the death of Louis XIV. The intrigues of favorites and courtiers, financial manipulations, Law's relations with his wife and glimpses of other historical personages all combine to make a large canvas, at times exceptionally well done. Somehow the atmosphere of the period seems lacking.

Revolt in San Marcos, by Robert Carver North (Houghton, Mifflin, $3.50), is a story of life in Central America in the current era, centering around an Indian who grows from infancy to manhood in the tubulent fictional state. Torn between dictator and communist, San Marcos is the scene of an uprising slightly complicated by Yankee capital. The book is descriptive of the poverty and politics of a backward state, but its characters are intensely human, evoking a sympathetic feeling toward the masses, whether Indians, Spanish or mixed. It is a "better" novel, dealing with a serious topic, and yet kept on an engrossing level.

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Lightly

Washed or unwashed,
Brushed or unbrushed the hair,
The beautiful young are beautiful—

Waking and fresh,
Waking or still asleep,
Lightly asleep or deeply—

What could the watcher wish
More than to see them ever every-wise,
All ways always?

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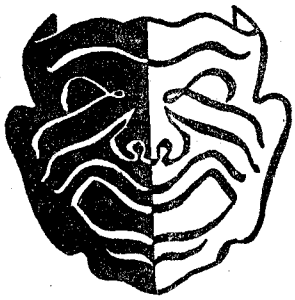

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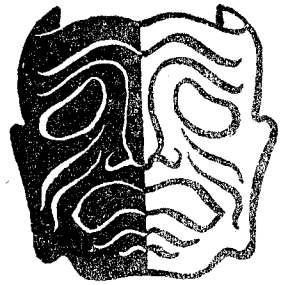

by John Gassner

It is hardly an exaggeration to say that every literary form has extremist tendencies inherent in its very nature, and that these are apt to grow stronger rather than weaker, sometimes even at its height. The lyric is apt to become so overly lyrical as to sacrifice sense to music and thought to cadence. The epic is inclined to become episodic and clogged; the novel, to become formless.

We have seen this happen even in arts as young as radio and television. Radio tends to be sound-mad, the "sound effects" taking precedence over everything except other kinds of sound such as the oleaginous oratory of Gabriel Heater or Norman Corwin's worthy yet occasionally tumid eloquence. Motion pictures became movement-mad, until the Hollywood specialists now know of no other way to sustain a story than to keep changing the scene. Only the theatre was initially in a better position to strike a balance between extremes because in it, action and speech, movement and reflection, tended to maintain an equilibrium.

Yet the danger of this balance being destroyed has always been present. Verbosity has often made the drama static, or the necessity of having action in a play has driven out thought, reduced the value of speech, and given us the aridity that characterizes a great deal of modern dialogue. No playwright of major proportions since the beginning of the theatre has suffered such insufficiency of speech, considering the needs of his drama, as Eugene O'Neill. No writer of comedy has been so sparing of words and so monosyllabic as Noel Coward. No tragedian has alternated so frequently in verse between the prosaic and the verbose as Maxwell Anderson.

No important epoch in theatrical history has been as wanting as ours in language and in the right use of it, and this is another of the difficulties that dramatists will have to surmount if our drama is not to stagnate. The want of language was less serious when the theatre had no competitors, but it has been a problem ever since motion pictures succeeded in providing a good deal more action and plot than plays can actually provide. In the old-fashioned melodramas, the concentration of the audience was upon the intrigue and it was sufficient. Rare indeed is the stage melodrama nowadays that does not seem skimpy beside a competently executed motion picture thriller. This disparity between stage and screen is, moreover, almost equally great in the case of farces and comedies. Hollywood can be lavish with visual contretemps that keep the public roaring senselessly, while the theatre has to rely on infrequent complications and few physical appeals to our elemental sense of humor. The stage accommodates relatively few scene changes and can keep the actor only on one plane and always at the same size throughout the performance. Many an antic by Cary Grant masquerading as a woman in the latest popular film, *I Was a Male War-Bride*, would provide scanty edification in the theatre.

Language, then, remains the main source of dramatic effect. In order to find acceptance on the professional stage, melodrama must blend into psychological and moral drama, as in Sidney Kingsley's current *Detective Story*, or into drama with social relevance, as in Lillian Hellman's *The Little Foxes* and *Watch on the Rhine*. Comedy must abound

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in epigram of a more diffuse kind of wit, as in Shaw, Behrman, or Philip Barry. Farce-comedy of the Kaufman and Hecht school of playwriting must at least resort to that degenerate or pinchbeck variant of wit known to us as the wisecrack. Farce, in which the non-verbal element is most in evidence, has won support on Broadway only when its subject is a private joke among cosmopolitans like "shoe-string" stage producing, as in *Room Service,* or gambling on the races, as in *Three Men on a Horse.* Only musical comedy has been subject to no special limitations for the public provided the girls are lovely and brisk and the music and dancing lively. Yet even here there is a difference between the requirements of our film and theatre capitals, for Hollywood needs only ready cash for sumptuousness while Broadway needs some modicum of taste and humor.

If the theatre is to compete with the mass media, it must effect a miraculous return to its former power as literature while losing none of its capacity for dramatic movement. The new Broadway season promises us hardly more than 60 productions as against nearly three hundred 20 years ago, and of these at least 70 per cent are doomed to virtually instant failure. Everything that time, money, and labor can do has already been tried by producers. It is time to try literature again. There is good precedent for this, as we may see by reciting the dozen or more great names in the field of playwriting.

The beginning was *not* the word in the theatre, it is true. But the word or chanting chorus was at the beginning of what theatre we know today, and it is precisely the word that has started failing us. How unfortunate this situation is, however, cannot really be known to anyone who has only a dim conception of what the modern drama has become and has had to face in the new social context of the twentieth century.

Many of the old reliable wellsprings of drama have become nearly, if not entirely, dry. There was a time when comedy drew substance from a stable society. Long-rooted habits and social relations provided the playwright of previous centuries with a ready frame of references. He did not have to create the conditions of comedy; they were present for him in the idiosyncrasies of known types and the indurated failings of different classes. The fop, the miser, the pedant, the hypochondriac, as well as the rascally servant and the professional parasite had their recognizable and established place in society in classic times and after the Renaissance. The sharp discrepancies of speech or conduct (generally both) between master and servant before our age leveled them, supplied a ready source of humor.

Morality was fixed by custom, and deviations from it, as in a Restoration comedy or a French farce, possessed a certain aura of wickedness or bravura which vanishes the moment deviation becomes the rule or becomes too easy. There is no longer any fun in violating traditions that do not exist or have lost their power over us. What could the Restoration playwright have done without the rise of a middle-class morality which it was dashing to outrage? What, for that matter, would American writers of the 1920's have done if there had been no vestigal puritanism to mock or defy, no old families of the cotillion school to oppose in the style of Philip Barry's *Holiday,* no prohibition amendment to make merry with?

When the old order vanished, many reliable provocations to comedy lost their salt. For a time, the subject of divorce proved fruitful, and its products, especially in England where tradition against it was stronger than here, produced good comedies like *The Circle* and *The Constant Wife.* But the sentiment against divorce disappeared in non-Catholic countries —with the result that one more good subject, one more useful irritant to talent, was gone. For a time, the "new woman" struggling against convention and later herself becoming a convention was at the disposal of the comic writer. Now, both the convention the "new woman" rebelled against and the convention she herself became are largely lost to us.

For a time, after World War I, the sophisticated "younger generation" was rampant. It provided the *Private Lives* style of humor that was perhaps more rewarding to the humorist because it so quickly froze into a pose or a habit than because it flouted respectability. Mr. Babbitt, the Main Street *bourgeois gentilhomme* and not the Harvard humanist, then took the place of the Coward

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scapegrace, and to him we owe not only many a lowly comedy but also a romantically transfigured one like Eugene O'Neill's *Marco Millions.*

Babbitt was unfortunately an easily exhausted subject and in the depression of the 1930's he even lost the inane aplomb that made him invite the comic hot-foot. The psychoanalyst became Babbitt's intellectual equivalent for a time when self-assurance sat on him like a Rotarian's *fez,* giving us plays as good as *Reunion in Vienna* or *End of Summer.* The psychoanalyst, however, vanished from comedy's horizon when he retreated into his office and into the psychiatric clinic and ceased to be oracular in print outside the learned journals. And so it has been with other clay pigeons of the theatre, including *Born Yesterday's* war-profiteer Harry Brock. They lost their little place in the shooting-gallery because they lost their prominence in society. The subjects of comedy before our time seemed eternal in societies more stable or more slowly changing.

As the decades roll on, it would appear that modern comedy must be a comedy of ideas if it is to sustain itself. Not that "ideas" are not as subject to mortality as fashions and cults, but they have a power of rejuvenation almost protoplastic in character, and perhaps for the same reason. They are fundamental like cell tissue. They appear, disappear, and reappear. They are the eternal element in an Aristophanes and a Shaw.

Comedy of ideas, however, is more dependent upon the "gift"—the gift of tongue—than any other form of humor. You can fall inelegantly down a flight of steps without a word, and ample utterance has never been a prerequisite for couples jumping in or out of bed. But where would the virginal Shaw, that Irish nightingale, be without his verbal talent? And it is precisely in this respect that our theatre has been only moderately endowed whenever Shaw was silent. Fortunately, this was rarely the case for four decades, but communion with the theatre became rare and not always entirely successful for the great conversationalist after the early 1930's. Even Shaw is not immortal in the flesh. Maugham, too, has departed from the English-speaking stage, and the voices of Robert Sherwood, Philip Barry, and S. N. Behrman cannot quite fill the hall. As for the younger contemporaries, they have been more inclined to shout chants of social significance than to write comedy. Detachment is hard to come by in our age, and for comic art some degree of mental distance is indispensable.

This leaves us only with the field of serious drama, and there is some comfort, we may concede, from newcomers like Tennessee Williams and Arthur Miller on our side of the Atlantic and from Sartre and Camus, on the other side. Serious drama is, fortunately, less dependent upon the stability of an age than upon intensity of temperament and tension in the environment. Since there is no lack of the latter commodity, it engenders or at least feeds the former. Williams' and Miller's penetration of character and power of compassion, as hitherto revealed, are both fulfillments, although as yet too few in the number of productions that succeeded in our theatre. Sartre has flexed mental muscles in all his work for the stage and has also given us some greatly needed moral exercises, in spite of some rather gelid attitudinizing in his "existentialism." *The Flies* may be a somewhat academic repetition of the Orestes story but it has a lifting power. The ironies of *The Respectful Prostitute* have an acid bite, and the heroics of *The Victors* may suggest Corneille in modern dress but it is quite stirring.

O'Neill, among the older men, has made sultry thunder in the theatre for three decades, and his most recently produced drama, *The Iceman Cometh,* was a jeremiad more wanting in economy than in pity and passion. If negativism could hardly go further than it did in *The Iceman Cometh,* it was at least a negativism honorably won and staunchly maintained to the very end. Maxwell Anderson's work up to *Anne of the Thousand Days* has remained full of echoes, but these have at least had a resonance from the spacious Elizabethan age. He is a lofty writer and, for all his well-noted shortcomings, he knows how to command a phrase. Every now and then Ireland, which felt O'Casey's fire a quarter of a century ago, has sparked the drama into a small flame, as in the case of *Shadow and Substance* and

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The White Steed. And even England, less given to intense writing, brings forth an occasional *Corn is Green,* a J. B. Priestly morality of some pertinence and force, and a *Winslow Boy* in which British reticence becomes granite pertinacity.

When all this is conceded, however, it must be noted that the word still falters on the lips of our tragedians and serious dramatists. Tennessee Williams is in danger of 1890 estheticism when he is not speaking the idiom of the Southern belle, and even in Miller's *Death of a Salesman* we may be aware of a curious atonality. If the dialogue is appropriately colloquial and cannot be deprecated for failing to become immortal verse, it is nonetheless regrettable that the powerful scenes somehow miss incandescence. It is a play that should have a greatness equal to its conception. This consideration is more important than an easy accord between its suburban characters and the language they speak—especially in a drama that takes every other liberty with realistic dramaturgy and fluctuates between actual and subjectively recollected facts in the life of its hero Willy Loman.

Clifford Odets, whose lips appeared to have been touched with a glowing coal in *Waiting for Lefty* and *Awake and Sing* a dozen or more years ago, proved himself as gauche in dialogue as in dramatic logic in the play with which he chose to return to the stage after a long absence last year. William Saroyan has not come anywhere close enough to the sanguine charm of the "beautiful people" in the three plays that won him a hearing before the war. Lillian Hellman had a dry strength that became rather arid in her last two acidulous contributions to the anti-heroic drama. An able craftsman and thoughtful writer, Sidney Kingsley gives us a solid play, like *Detective Story,* but he strikes few sparks of passion memorable for utterance as well as action.

Commonplaceness has settled upon the Russian drama now that it has become journalistic and time-serving in what it must regard as a patriotic cause. The Scandinavian theatre, once graced by Ibsen and Strindberg, is now merely sound and sane rather than inspired, and the Central European stage has not brought forth a single play of incontestable merit for decades. Spain under Franco has apparently ceased to be a source of modern drama. The theatre of Benavente and of the lambent poet Frederigo Garcia Lorca, executed by Falangists at the start of the Civil War, is all but silent. And Italy has yet to bring forth a new breed of Pirandellos.

The word, however, is only an echo of the spirit, and here it must be noted that the confusions and divided attitudes of our time have had their parallel in the theatre. A clear penetration, a large conviction, a great-hearted grief or well focused indignation gave different dramatists their force when plays like *The Cherry Orchard, The Lower Depths, He Who Gets Slapped, R.U.R., Juno and the Paycock, The Plough and the Stars, Awake and Sing,* and *Waiting for Lefty* were written. Now, as a result of the deadlock in our civilization, even eloquence tends to become reiteration or to be misapplied, as we may note variously in the more or less recent plays of the great O'Casey, T. S. Eliot, Anderson, and Odets.

More frequently the words come clearly and appropriately enough, as they do in *Death of a Salesman,* but something is apparently not blazing at the core. Until it does, the regenerative power of the theatre, which has inclined to be moribund enough for purely economic reasons, will continue to be questioned. Nor is this regeneration apt to come from mere poetry of feeling or even vision unsupported by concrete realities, as was apparent in T. S. Eliot's modern tragedy *Family Reunion.* The only poetry in the theatre that remains vital today is Bertolt Brecht's. But Bertolt Brecht, who now lives in Switzerland, belongs to no country's theatre. In spirit, he belongs to every country's theatre, but it is symptomatic that the stage has not gladly availed itself of plays like Brecht's *The Caucasian Circle of Chalk* and *The Good Woman of Sezuan.* It prefers, in the main, to crawl with the gnats rather than soar with the eagle. We may say very much the same thing, too, unfortunately, about O'Casey's last drama *Red Roses for Me.*

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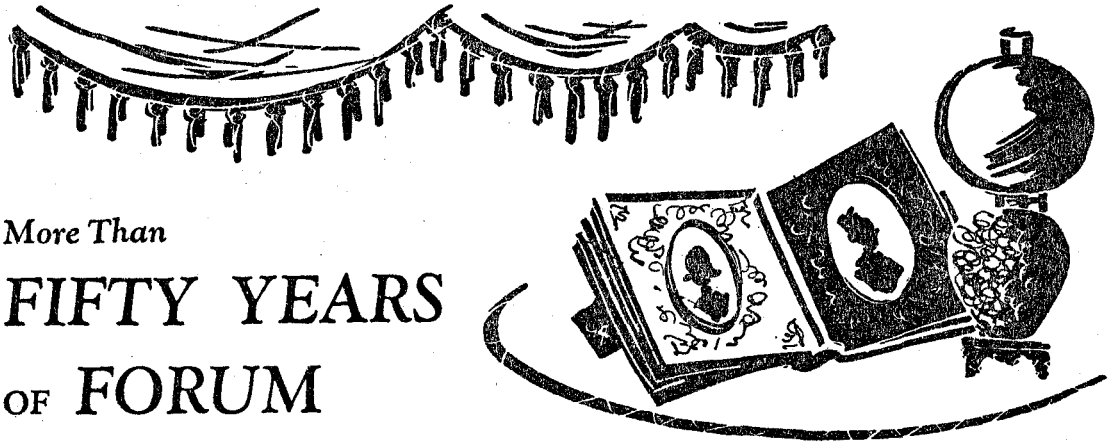

More Than

FIFTY YEARS OF FORUM

In the November, 1912, issue of FORUM there appeared an article entitled "The Electoral College: Its Prerogatives and Possibilities." The author, John Walker Holcombe, proposed that the Electoral College should be used both to nominate and elect the president. This suggestion may seem strange today when there is so much argument in favor of abolishing the Electoral College. Yet Mr. Holcombe's ideas might have seemed just as unique to readers in 1912 if we remember that the trend of the times was toward more popular control of government.

"It may be interesting to consider how the system here advocated would work in practice. Assume that in the year 1916 there have been no nominating conventions and no persons have been proclaimed candidates for President and Vice-President. The Electors, numbering five hundred and thirty-one, have been chosen at the November elections by direct vote of the people and Congress has designated a city and made suitable appropriations for the meeting. The College assembles, chooses temporary officers in the usual manner, by whom the roll of members is made up, and the body conducted to a permanent parliamentary organization.

"The College adopts such rules as may be necessary for its special work, and proceeds to business. Candidates will naturally be presented in nominating speeches, and there will be a lining up of Electors by parties. If the smaller parties of the country, the socialist, the prohibitionist, woman's suffrage, labor, etc., have chosen any Electors, these will doubtless make themselves heard, and may wield some influence. Under present conditions the real contest will be between Republicans and Democrats. Party caucuses will be held, in which different factions will contend for their favorites, and the name agreed upon by the Electors of each party will be presented to the College. The voting will be conducted in any manner the body may order, viva voce, by count of heads, by call of the roll, by ballot or otherwise, and if one party has a majority a nomination will easily be made. If there be no majority of any party, there being three or more parties represented, the situation may become difficult, but always less difficult and with better chance of solution than in elections by the House of Representatives, under existing constitutional laws. The College will appreciate the imperative duty to nominate a candidate who will receive in the formal election a majority of all the Electoral votes. The wisdom and patriotism of such an assemblage will find a way. A rule of elimination, dropping the name or names lowest on the list after each voting, would speedily effect a nomination, and enough members of the least numerous party or parties might pledge their Electoral votes to the candidate thus named, to insure his election. A candidate for Vice-President having been chosen in the same manner, the Electors will return to the several states, and assembling in their capitals on the day appointed by law will give, certify and transmit their votes in the regular manner, the nominees of the convention receiving a safe majority."

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FORUM: Should Elected By Direct

YES!

By JOHN B. ANDREWS

". . . . in proportion as agents to execute the will of the people are multiplied, there is danger of their wishes being frustrated; some may be unfaithful, all are liable to err."

In these words Andrew Jackson advanced the proposition that the law of presidential election was undemocratic and needed revision.

According to the Constitution of the United States, Article II, section 1, special groups of electors in each state of the union were to elect the president of the United States. The original provision follows:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.
>
> The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom at least one shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President; if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. . . .

The first four presidential elections were conducted in accord with this original provision of the Constitution. In the election of 1789, when Washington was unanimously elected President, John Adams became Vice-President. Behind-the-scenes wire pulling by Alexander Hamilton ensured that Adams should not rival Washington in votes, since there was no constitutional method of differentiating president from vice-president during the voting process.

The election of 1800 illustrated this difficulty more clearly, when Republican candidates Jefferson and Burr drew the same number of electoral votes. There was no doubt that the electors intended Jefferson for the presidency and Burr for the vice-presidency, but the final vote had to be cast in the House according to law. Because of violent feeling against Jefferson, it took 36 ballots in the House to break the deadlock.[1]

To clarify the voting, the Twelfth Amendment to the Constitution was adopted by the states before the 1804 election. This amendment provided for separate voting for president and vice-president, with a majority of the total number of ballots needed for election to either office. In the event that no candidate has a majority for the presidency, the House is to choose among the three highest candidates; a similar provision regarding the vice presidency gives that choice to the Senate.

The electoral system developed by the Constitution framers and accepted ever since with very slight modification is undemocratic, cumbersome, anachronistic, unrealistic, and

[1] It was actually broken by Hamilton's personal influence.

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The President Be Popular Vote?

NO!

By THOMAS J. BROWN

WHEN we as a state are now a member of a slowly evolving United Nations, we can learn much by comparing the growth of the United Nations with the formation of of our own federal union. We do not want to see a world state in which each man has one vote, because we would be outvoted by China, Russia, and India, three nations with ideas of government quite different from our own.

When the United States became a nation, Rhode Island did not trust New York or Pennsylvania. Therefore, it, like all the other states, entered a compact, our Constitution, which reserved many rights to the states.

Among the rights which the small states were granted was over-representation in the Senate and in the Electoral College on a strict population basis. If, in the federal Constitution we gave excess representation to Rhode Island, it was because Rhode Island feared the power of its larger neighbors. If today Rhode Island indirectly takes advantage of the fact that it once feared New York by continuing to have two senators while New York has only two, this is not too great a price to pay for the advantages that have accrued to the union as a whole.

In fact, we have profited much more from our federal system than we have lost by its occasional anomalies and the question before us is whether or not we would gain by doing away with a specific part of our federal system, the Electoral College, and by substituting for it the direct election of the President by popular vote. My opponent claims we should. I disagree.

Although the federal form of government has its weaknesses, it has its strengths as well. Functions reserved to the 48 states and prohibited to the federal government prevent the central government from becoming unbearably top-heavy and inefficient. The dwindling but still important power of the states serves to protect the citizens from the assumption of dictatorial power by a Washington administration.

Today we want the United States to have the final authority when we dispose of Marshall Plan aid to Europe. We do not want any or all of the nations of Europe to be able to decide how much of our income shall go to aiding Europe. We do not even want them to be able to decide what percentage of the whole shall be given to any specific nation. We do expect them to consult with each other and with us. This is obviously a looser type federation taking form. And, in the larger federation it is perhaps easier to see the importance of maintaining the functions and independence of local units.

We certainly should not forget that the United States is not only a government composed of states. It is also composed of important widely varying sections. The electoral college and our federal form helps protect each of them from domination by other sections. Today, for instance, the southern states would lose most of their remaining influence if a nationwide majority were required for voting. Liberals of the South and the North may think that this influence is exerted to the detriment of the whole country, the South included.

Because our federal form of government has worked so well, we are inclined to take it for granted. We ignore the basic concepts which impressed themselves upon the men who wrote and adopted our Constitution. My opponent speaks glibly of power. He is willing to concede that the power of the President is great. He says it will inevitably grow greater. He feels that it is directly exerted upon the people. He thinks that it can best be controlled by the election of the President by the direct vote of the people.

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unrepresentative. When the Federal Convention met in 1787 in Philadelphia, the form of the government to be established and the nature of its executive were still in doubt. On one premise the majority agreed: all danger of monarchy was to be avoided and the presidency was not to be made too strong. It was obvious to these statesmen that the method of electing the president might have a far-reaching influence on his power in federal affairs and even within the states themselves. James Wilson, of Pennsylvania, is reported to have told Pennsylvania delegates considering ratification: "The convention [delegates] . . . . were perplexed with no part of this plan so much as with the mode of choosing the President of the United States."

The Constitution framers were of course familiar with the danger of having the executive chosen by the legislature, but they also had experienced in their states the executive strength which rose from direct election of governors. In a choice between evils, the Convention leaned toward legislative election. Mr. Roger Sherman, of Connecticut, for one, "was for the appointment of the president by the legislature, and for making him absolutely dependent of that body, as it was the will of that which was to be executed." An independent executive, he believed, was "the very essence of tyranny." Wilson advocated the electoral district system. Governeur Morris spoke up for a national election "by citizens of the United States." John Carroll and Benjamin Franklin supported Morris, but Madison was driven to oppose him because of the "character of the suffrage" in the South. The formulation of the electoral system, originally outlined by Alexander Hamilton, at first pleased few, but was finally adopted by the constitutional convention. Most of the gentlemen present agreed with Elbridge Gerry that "the popular mode of electing the chief magistrate would certainly be the worst of all."

History has given the lie to Mr. Gerry in illustrating the evils of the electoral system. The growth of two great political parties, the wide extension of the suffrage, and the picturesque national presidential campaigns have blinded us to the nature of the presidential election. The national election seems like direct election by the voters, and the Electoral College seems like an old-fashioned formality. Still, as Professor William Anderson of the University of Minnesota points out:

> . . . . we must not forget (a) that the legislature in any state can at any time legally provide a different way of choosing presidential electors (b) that it could even choose the electors itself, or set up a special body of voters to choose them (c) that election by these electors is not the same as election directly by the voters . . . . and (d) that the electors are not *legally* bound to vote for the party candidate.

In any election, the electoral system denies representation to minorities within the various states. The party which gets the highest vote in each state elects its entire slate of Presidential electors. Minorities get no representation because the electoral vote of each state cannot be split. Legally, the candidate who gets the largest number of electoral votes, not popular votes, is the winner.

Because of the electoral system, it is possible for the candidate winning the popular vote to fail of election. This has already happened three times in our history, and provides an extreme example of the undemocratic nature of our elective process. In 1824, 1876 and again in 1888, the Electoral College vote ran counter to the popular vote. In 1876, Rutherford B. Hayes won the election with 185 electoral votes as opposed to Samuel J. Tilden's 184 votes. The popular election figures however, stood 4,285,992 for Tilden and 4,033,768 for Hayes. The closeness of the election and the disorganized condition of several southern states gave rise to a long-drawn out conflict over the election results, which was finally settled by a specially appointed commission of 15. The majority of the electorate however, undoubtedly chose Tilden for president, despite the choice of the Electoral College and the special commission. Direct election would have precipated no such controversy.

Again, in the election of 1888, Benjamin Harrison was elected president by the Electoral College, although the popular vote went to Grover Cleveland, 5,538,233 to 5,440,216 for Harrison. The election of 1884, in which Cleveland won both the popular and the

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electoral vote, may serve as a prime illustration of the undemocratic working of the electoral process. In five New England states, nearly a quarter of a million popular votes were cast for Cleveland, but not a single electoral vote went to him from these states. In five Western states, 1,194,006 votes were cast for Cleveland, but Blaine got the full 82 electoral votes of those states. Blaine suffered also, in states such as New York, where the popular vote had never been so evenly divided. Although more than half a million New Yorkers voted for Blaine, the entire electoral vote went to Cleveland. The final results of this election were: Cleveland, 219 electoral votes and 4,911,017 popular; Blaine, 182 electoral votes, 4,848,334 popular.

Because under the present system a president may be elected without having a popular majority, the present system is clearly undemocratic.

REPRESENTATION

Because it protects an outmoded doctrine of state sovereignty, it is also unrepresentative. On a strict population basis, the small states are greatly over-represented. Nevada, for example, has three electors for less than 100,000 population, while New York has 250,000 inhabitants to every elector it controls. The system does not justify itself by protecting the small states because the 12 most populated states have more than half the electors. Nor are geographical sections protected, since the states of the Northeast (with Minnesota, Iowa, and Missouri as the western fringe of the region) have more than half the total vote.

The Electoral College system and the consequent "key position" of certain large states has occasioned the doctrine of "availability" for choosing presidential candidates. Thus the ablest men may be and are by-passed while the man who can swing New York becomes a candidate. This is another indirect evil of our current system.

The electoral system, actually, reflects the states-rights doctrine which was branded anachronistic by the Civil War. In a loosely-knit federation of sovereign states, it was of course arguable that the president of the federation should be the choice of the *state* government. Because this was the original concept, the electors met (and still meet) in the various *state* capitals, and the names of the electors are sent to the Secretary of State by the state governors. In case of a contested election in any state, it is settled by the state itself in accordance with state law.

Today, however, the president is not the representative of the various states; he is the chosen national leader of the people of the United States. In the course of our history, his position has become far stronger than was originally intended; and his relationship to the American people has become direct, instead of indirect. This relationship is reflected in the fact that Americans vote not for electors, but for presidential candidates; the electors themselves are unknown to most of the voters (some states even leave the names of the electors off the ballots).

The electoral system also reflects an anachronistic concept of the role of the American president. Originally, the Constitution framers tried to provide for a president as weak as would be consistent with orderly government. Executive power was feared, hated, and distrusted by the framers of the American Constitution. Largely for this reason they avoided direct contact between the president and the American electorate at large. Today however, for better or worse, we have the strongest chief executive in the democratic world. The American press, the radio, the movie, and television screen ensure the President's intimate and direct contact with the American people. There is no valid reason for not recognizing this vital change.

In addition, the outmoded and undemocratic system outlined above is cumbersome, slow, and unwieldy. After the national elections in November (at which the actual decision is made), the electors meet on the first Monday after the second Wednesday in December to cast their rubber-stamp ballots for the president and vice-president. Once these are transmitted to Washington, they are published by the Secretary of State, and copies are sent to the two houses of Congress.

On the sixth of January following, Congress meets in joint session to watch the counting of the electoral ballots, and take action on contested ballots, if any.

As a formality the above procedure is expensive and time consuming. So long as the

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electors merely rubber-stamp the November election, their role is meaningless. And if ever they should depart from the popular election results, their role would be autocratic.

The alternative constitutional method of presidential election, i.e., by the House of Representatives in case of a tied electoral vote, is undemocratic on the face of it. A House election by states is on all counts unjust, and the possibility of allowing the members of Congress to make a president is an ever-present danger. Remember, in this connection, that one man (Alexander Hamilton) supposedly held in his hand the choice between Jefferson and Aaron Burr in the election of 1800! As Martin Van Buren declared in 1826: "There was no point on which the people of the United States were more perfectly united than upon the propriety, not to say indisputable necessity, of taking the election of President from the House of Representatives."

The ancient system of presidential election indirectly through the electoral college cries out for change; the direct, popular election of the president is a democratic necessity. Why has the old system remained so long? Partly because change is resisted by the very terms of the Constitution governing amendment; partly because many Americans are unaware of the existence of the indirect system; partly because we are suffering from an inaccurate understading of the nature of our federal government.

The pre-1860 concept of the United States as a union of sovereign states exists no longer; the sovereign states, by the same token, have been discarded. The exigencies of history have forced this country into a strong centralized form of government, headed by a strong executive with very direct control over the people of the United States. Since this is true of the government and of its executive, it is equally true that the people of the United States must establish a strong and very direct control over their president. His direct election by all the people clearly furthers this end.

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On the contrary, it seems to me that the original concept of government of which the Electoral College was a part is extremely important. Through the years, we have abandoned rotation in office. We have widened the suffrage until we have, in effect, universal suffrage. We have seen the growth first of parties and now of a two-party system in which too often the only difference between the parties is that one is out and the other is in. We have developed the radio, the movies, the newspapers, and the magazines into a related system of mass information. With them we have developed techniques of using these "media" of mass communications. These techniques gave a great advantage to the President and to the party in power in any election.

When the Constitution was adopted, we did not have universal suffrage. Parties were ill-defined. Washington, when he was elected, was not a party candidate. Jefferson, the leader of the Republicans, and Hamilton, the leader of the Whigs, both were members of his cabinet. Nevertheless it was assumed that the Electoral College would, in fact, be better qualified to elect the President than the voters would be. This was the product of the fear of power. These men feared "tyranny." They knew that the worst tyranny might well be "the tyranny of the majority." They were concerned with the protection of minorities. After all, the Bill of Rights is a protection for the ultimate minority of one.

The world they lived in was simpler than the world we live in. Each individual was of more importance to them. They did not see that one day one group of men might look to the government for aid against another group. But the restrictions they put upon government to prevent the "tyranny" which they feared have worked well and are, it seems to me, our best protection against a different form of tyranny today.

To turn to our present problems, we have universal suffrage but we face problems which universal suffrage is not competent to solve. Recently the British devalued the pound drastically and dramatically. It is safe to say that most people both here and in Britain have no clear idea of what the ultimate effect

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of this action may be. It is also safe to say that the action was forced upon the British government by a friendly and well-intentioned American government. It is certainly possible to believe that the British government was right. But it is hard to see what value a general election in either country would have had upon the matter before the British government either accepted or rejected the position of the Government of the United States. Afterwards, if the results are bad enough in either or both countries, the electorate certainly can and will turn out the government whose policies have failed.

The necessity to decide between conflicting groups of experts is one of the basic difficulties of all government. Stalin, like President Truman, has military advisers, and economic advisers, to mention only two groups. Russian generals and Russian economists, like their American counterparts, must disagree. Somebody must decide between them. Should the man who makes such a decision be answerable for its consequences? If so, how?

Stalin is answerable with his life and the possible overthrow of his government as the result of a civil war. He might have been overthrown by Hitler. He certainly says he fears the efforts of the United States to overthrow him.

RESPONSIBILITY

All governments, "tyrannies" and "democracies" included, want to stay in power. But within all countries there are "factions" or "parties" opposed to the party in power. The basic concept on which we work is a concept of responsibility. The party in power is answerable to the people at every election. To be answerable there must be an effective opposition. Anything which tends to perpetuate the tenure of the party in power weakens our form of government.

It is my contention that widespread suffrage by itself tends in this direction. The election of the president by direct popular vote would increase the tendency because of the great advantage which our mass media of communication give to any man in office. Obviously we should strengthen our universal suffrage but not by giving the voters the relatively artificial choice between two men, but by the much more important choice of electors. The electors, not pledged to a party candidate, could choose the best man regardless of party.

We should restore and strengthen rotation in office. Perhaps we should accept President Wilson's suggestion of making the presidential term six years and the presidency an office that could be held only once.

Obviously one term for the president would tend to equalize the contest between the parties and increase the responsibility of the party in power to the electorate. Strengthening the Electoral College would permit a choice between more than two men for president. This in turn would serve to protect vital minority rights from the numerical force of nationwide majorities.

Direct popular election of the president as defended by my opponent would necessitate a uniform national suffrage and election law as well. If the president is to be the direct representative of "all the American people," then the franchise must extend to all uniformly, regardless of their state of residence. Now it cannot be denied that varying state laws with regard to suffrage are inconvenient and, in many cases, downright undemocratic. During the war years, many intelligent Americans were disfranchised because war conditions forced them to move from state to state. In any and every year, most of the Southern states manage to disfranchise their Negro population by means of the poll tax, the literacy tests, and other evasions. According to the Constitution of the United States, the source of the right to vote and of rules governing the suffrage rests with the states, subject to certain qualifications in the federal Constitution. The states are in general to fix the "times, place and manner of holding elections," as well.

Again, the arrangements concerning the suffrage and election are basic to our federal form of government, and to insist on changing them out of hand involves a basic misunderstanding of federalism. If we are to substitute centralized government for the federal system, let us do so after due deliberation of its merits and demerits. Let us not slide into centralization without understanding its significance.

An equally strong objection to the direct

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election of the American president is that this step would further increase the broad powers of our chief executive. It is obvious that the present power assumed by our president is far stronger than that originally granted him in the Constitution. Recurring wars and emergencies have slowly but definitely added to presidential power, until today our chief executive is the strongest democratic leader in the world. Once very carefully defined, the concept of "emergency government" and "emergency powers" has been enlarged since 1933 so that the president now feels qualified to declare an "emergency" at his own discretion, and to assume such powers as the right to enjoin strikes and settle labor disputes.

Those who advocate direct election of the President openly support a further increase in his authority. What the benefits of such an increase are to be, we are not told. Nor are we enlightened as to the proposed checks on executive authority to prevent the rise of dictatorship. Such checks are obviously imperative. Before jumping to change our electoral system, let us continue to hold to the indirect election of the president as one link in the chain that safeguards us from dictatorial power.

Today we have not only the growth of the power of the president, but the growth of the power of the presidency. The man has become an institution. There are almost two million federal employees. Most of them, protected by Civil Service, or appointed without this protection, think of themselves as part of the administration. Washington made 65 federal appointments; President Truman thus far has made 1800.

It has been argued that the indirect electoral system may cause the election of a president not of the majority's choosing. The election of 1876 is cited by my opponent as a case in point. Now this election was distinguished from beginning to end by fraud and corruption, and complicated withal by the reconstruction problems of the southern states. No one who reads of the scandals in Florida, for example, in connection with the choosing of presidential electors for that election, can blame the results of the election on the electoral system. The popular vote in question was extremely close, the electoral vote went aganist it because of a variety of factors, none of which were inherent in the system.

In truth and in fact, the history of our presidential elections proves the converse of my opponent's theorem. In only two instances in our history (and both times the popular vote was very close), did the electoral vote go against the wishes of the majority. The danger of a president's election by a minority is therefore very remote. It exists, of course, and its existence serves to remind potential demagogues that more than popular support is necessary to win a national election in this country. Small but independent states, minority but vital regions—both must give at least part of their support to the successful presidential candidate. Such minority representation is in fact an integral part of our successful federal system.

One further objection to the direct election of the president is the increase in federal expenditures which such a change would entain. The federal government, as we pointed out above, would be responsible for uniform suffrage laws, uniform election procedure, and for the management and operation of the polls themselves. The simple enforcement of universal suffrage in itself would add tremendously to the federal burden (if such a principle could be enforced at all). The federal failure to enforce universal suffrage would, of course, be an even more dismal failure than that of the states, and one that would add propaganda material to our enemies' dockets.

Careful consideration points up the grave weaknesses in a direct election for the president of the United States. Obviously, our electoral system is not perfect; indeed, it has some serious weaknesses. Many of these can be corrected by reforms. The convention system for the nomination of presidential candidates, for example, calls for major overhauling. Electoral corruption in the South cries out for *local* improvement and for educational campaigns on a national scale. The apathy of the American electorate even in a presidential election is only in part a reflection on the educational system of our country. It is true that often only about fifty per cent of the qualified voters go to the polls. But it is also true that the percentage of voters

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seems to decrease with the increase in education. What makes my opponent think that direct election of the President will increase the control of the people over him?

The problem might be solved if a multiple choice were given to those who may have believed that neither President Truman or Governor Dewey was an ideal choice in the last election.

Political corruption can only be controlled by constant vigilance. And the electoral system as it operates today can be improved to make it less cumbersome and less lengthy in operation.

As always, the eager reformers, seeing weakness, push toward complete change, with incomplete understanding of the meaning of the reforms they suggest. Few Americans consciously want to end the federal system of government which works so well; fewer desire to grant unlimited, dangerous influence to an already powerful president. The direct popular election of the president is a step toward both these undesirables. It is fortunate that the states of the union will not easily be persuaded to abandon their electoral rights. The direct election of the president remains both impractical and undesirable.

The counter man in one of Chicago's restaurants favored by physicians watched with horrified fascination while a patron unwrapped a chocolate bar, laid it between slices of buttered toast, and munched with obvious relish. Turning to another customer, the food purveyor observed, "Now, there's a psychiatrist who needs a psychiatrist!"—*Chicago Tribune*

I suppose it is not irreverent to say that practically all candidates receive some help in preparing their public documents. In the case of a certain Mayor of New York, it was necessary not only to write the speech but to spell the longer words phonetically so that he could pronounce them. He was so dependent upon these prepared scripts that on one occasion at a patriotic banquet, he astonished all listeners by declaiming: "What we need is more of the spirit of one-seven-seven-six."

Mayor Michel of New York was talking at a dinner about office-seekers.

"A good man had just died," he said, "and with unseemly haste an office-seeker came after his job.

"Yes, sir, though the dead man hadn't been buried, yet this office-seeker came to me and said, breathlessly:

'Mr. Mayor, do you see any objection to my being put in poor Tom Smith's place?'

" 'Why, no,' said I, 'Why, no, I see no objection, if the undertaker doesn't.' "

The following admonition was addressed by a Quaker to a man who was pouring forth a volley of ill language against him.

"Have a care, friend, thou mayest run thy face against my fist."

A tourist was enjoying the wonders of California as pointed out by a native.

"What beautiful grapefruit," he said, as they passed through a grove of citrus-trees.

"Oh, those lemons are a bit small owing to a comparatively bad season," explained the Californian.

"What are those enormous blossoms?" questioned the tourist a little farther on.

"Just a patch of dandelions," answered the guide.

Presently they reached the Sacramento River.

"Ah," said the tourist, "some one's radiator is leaking."

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CONGRESS DEBATES: Pricing Practices

AS BIG BUSINESS has grown bigger, Congress has been concerned with the problem of preventing monopolies and encouraging free competition. Many monopolistic practices have already been declared illegal, but others, also considered harmful, have replaced them. One of the methods used to keep prices high is the basing-point system of pricing. This system, which existed primarily in the heavy industries such as steel and cement, is the result of agreement among the members of one industry to charge the identical price for their products in all parts of the country. Thus the consumer, looking around for steel, cannot save on quality, transportation, or quantity. This system has been declared illegal by the Federal Trade Commission, but the demand for it has continued among industrialists.

In May a bill (S. 1008) was introduced in the Senate to provide a moratorium until July 1, 1950, on all government prosecutions for use of the basing-point system. This, however, caused so much objection that its author, Senator Myers of Pennsylvania, agreed to accept a substitute (S. 1974) offered by Senator O'Mahoney of Wyoming. Mr. O'Mahoney, long a foe of monopolies, proposed instead that manufacturers be allowed to absorb freight rates and quote delivered prices provided they act independently. He believes that permitting industries to lower their prices to specific customers by absorbing freight costs will in fact encourage them to compete in markets the mills might not be able to enter without absorbing the cost of transportation. Therefore, freight absorption, engaged in independently of the other manufacturers in an industry encourages competition. Although some Senators disputed this, most were anxious only to see that the wording of the new bill was foolproof enough to prevent the growth of monopolies from the exercise of the privilege once granted to manufacturers.

FORUM presents below excerpts from two Senate debates on the basing-point system and freight absorption showing the workings of monopolies, lobbying techniques, and the efforts of Congress to combat their harmful aspects:[1]

* * * *

Mr. O'CONOR, Democrat, Maryland. Mr. President, American business and the buying public have few, if any, more vexing problems than that which is encompassed in the question of basing-point practices with which S. 1008, introduced by the senior Senator from Pennsylvania [Mr. MYERS], and now under discussion, has to do.

Judicial interpretations or administrative rulings have put the stamp of disapproval upon certain business practices which had been adopted and generally regarded as legal and proper. Immediately it was suggested that new substantive legislation should be enacted to clarify permanently the important questions involved, especially with regard to selling-price practices.

But at once it was realized that the emergency requires that until a complete study and extensive hearings can be conducted with regard to all phases of the problem, with its many ramifications, a moratorium should be declared holding in abeyance the pre-existing situation, prior to the decisions and rulings to which we have referred.

The sole purpose, therefore, of this prob-

[1] *The Congressional Record, Senate*, Vol. 95, No. 96, pp. 7156-7170; No. 97, pp. 7204-7232.

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lem is to confirm the right of individual companies to use certain pricing practices until July 1, 1950, when there is no conspiracy and when the practices are pursued for the purpose of engaging in competition in good faith.

Definitely, there is no permanent legislation involved in this enactment. Neither is there an attempt to commit the Congress to a certain course of action, or indeed, to any action at all. I think it is well that there be a general understanding and acceptance before we go into the detailed discussions of the proposals. For that reason, I should like merely to read one sentence from the text of the pertinent paragraph. Reading from page 2 of the amended bill, line 11, the words are as follows:

> That until July 1, 1950, the Federal Trade Commission Act, as amended, and the Clayton Act, as amended, shall not be construed as depriving individual companies, in the absence of conspiracy or combination or other agreement in restraint of trade, of the right to independently quote and sell at delivered prices or to absorb freight for the purpose of engaging in competition in good faith in any and all markets.

. . . . . .

There are, generally speaking, two kinds of basing-point pricing — a single-basing-point system and a multiple-basing-point system. In a single-basing-point system, all products of a given nature are priced to all buyers in all markets as though they all originated at a single shipping point, even though shipment may actually be made from that point or from any two or more different points. For some 50 years prior to 1924, a single-basing-point pricing system was employed in the steel industry, and this is the system commonly referred to as Pittsburgh plus. Under this system, steel was sold to buyers in all markets at f. o. b. mill prices based upon the fiction that the point of origin for all shipments was Pittsburgh. Irrespective of the location of the mill from which he purchased, a buyer paid, under this system, the f. o. b. mill price, plus the rail freight cost from Pittsburgh to the point of delivery.

This practice was held illegal in the case of *Corn Products Co.* v. *Federal Trade Commission* (324 U. S. 726), decided in 1945. Senators should understand that the impropriety of the use of this practice has not been questioned in connection with the deliberations on Senate bill 1008, and the legality of this practice is not involved in any way in this bill. I have described this system simply to aid in a full understanding of the problem.

The difference between the single-basing-point system just described and a multiple-basing-point system is that the latter includes two or more points of origin from which transportation costs are computed, which points may or may not be the actual point of shipment in any particular case. Mills whose locations are used as basing points in determining transportation costs, under a multiple-basing-point system, are known as base mills, and other mills are known as nonbase mills. Customarily, under this system, there are substantially fewer price-basing points than there are points of production. Under this system the buyer pays the f. o. b. mill price plus the cost of rail transportation from the basing point which is closest to the point of delivery, whether the sale is made by a base mill or by a nonbase mill.

Under this system, therefore, the buyer might pay either the actual freight or some figure either more or less than the actual freight, depending on whether he bought from a mill closer to the point of delivery or farther away from the point of delivery than the nearest basing point.

It will be seen that if every producing mill is a base mill, the buyer will never have to pay more than the actual freight; that is, he will never have to pay any phantom freight. For this reason, there are many who contend that the basing-point system does not embrace a practice where every mill is a base mill, because in such case only freight absorption is involved.

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As I have pointed out, under the multiple-basing-point system, it is possible for a buyer to make his purchase from a producer whose base mill is located farther from the point of delivery than is the base mill of some other producer; and in such a case the buyer pays the seller the f. o. b. mill price plus the freight from the closest base mill; that is, plus a sum which is less than the actual cost of transporting the commodity to the

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buyer. In such case the seller is said to absorb a part of the cost of transportation; and this practice is what is generally known as "freight absorption."

I have already given one instance of "phantom freight"; namely, the case in which the base mill is farther from the point of delivery than is the producing mill, so that the buyer pays the seller the f. o. b. mill price plus a sum greater than the actual cost of transportation involved in the transaction. Another instance of "phantom freight" arises under a practice which has sometimes been used of charging a delivered cost based upon all-rail freight rates, even though the commodity might have been shipped by water or truck at a lower rate. In this case also it will be seen that the buyer pays on account of transportation costs a sum greater than the actual transportation costs. This excess also is known as "phantom freight." In point of fact any form of additional charge to the buyer on account of transportation which represents more than the actual cost of transportation in connection with the transaction may properly be referred to as "phantom freight."

The basing-point pricing to which I have just referred has been used primarily in heavy goods industries. A somewhat similar practice used in many industries encompasses the sale of commodities at a delivered price uniform to all buyers, or at a delivered price uniform to all buyers in a given area or zone, without regard to the variation of actual cost of transportation to any individual buyer. When the delivered price is uniform to all buyers throughout the country, the practice is generally known as a national uniform delivered price. Such a pricing system is used, for instance, in the sale of candy bars and chewing gum, cigarettes, many nationally advertised products, and many thousands of other products for which the seller charges the same price to buyers in all sections of the country without regard to the point of delivery. The same "pracing practice," if I may use the term in this connection, is used by the Post Office Department in charging for the carriage of mail. In the case of first-class mail the cost of transportation is "averaged" among all users. In the case of third-class mail—parcel post—the cost of transportation is "averaged" among users differentiated by zones. It can be seen that under either kind of "averaging" of transportation costs, whether on a uniform national basis or by zones or areas, in some cases the actual cost of transportation will exceed the imputed average; and in such a case the seller is absorbing freight. In other cases the actual cost of transportation will be less than the imputed average, and in this case the seller can be said to be charging "phantom freight."

Under the zone-pricing system, a seller may have only two zones, or he may have three zones, or a much larger number. The theory behind such a pricing system remains one of averaging the cost of transportation to all customers within each zone.

That will, perhaps, suffice as a discussion of terms.

CORN PRODUCTS

I have referred previously to the Corn Products case. In that case, the Supreme Court held that, when the requisite injury to competition was shown, the charging of phantom freight constituted an illegal price discrimination under the Clayton Act. Let me emphasize that there was no confusion about the Corn Products decision. What the Court held was clear, and it was clear how the Court's holding applied.

Let me say again, at that point, that the decision in the Corn Products case has not been challenged in connection with deliberations on the Myers bill now before the Senate, and is not an issue in any way in connection with this bill.

However, in another case—the so-called Cement Institute case, decided in April 1948—the Supreme Court did hand down a decision which has been the basis of substantial dispute as to its meaning, with resulting widespread confusion in business and industry.

The respondents in the Cement Institute case were charged with conspiring, and were found by the Federal Trade Commission to have conspired, to fix prices by means of the use of a multiple-basing-point system. They were also found to have conspired to discriminate in price, in violation of the Clayton Act, by receiving varying mill net returns. These findings were upheld by the Supreme

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Court, which thus found their practices illegal. Up to that point, there is no argument whatsoever with the decision; rather, there is universal agreement that all such practices are and must be illegal. The difficulties arose because of the dicta in the Cement case decision.

The doctrine of that case was that the conspired use of any pricing practice is illegal. It is, of course, elementary that any practice, even though legal per se, may become illegal when adopted by conspiracy. Thus, the doctrine in the Cement Institute case, holding that the practice of freight absorption, adopted by conspiracy, was illegal, did not encompass a holding that freight absorption itself was illegal. But the language used by the Supreme Court, by way of dicta, resulted in great confusion as to the right of a seller to absorb freight, when not accompanied by conspiracy. I repeat that last statement for emphasis. The language used by the Supreme Court, by way of dicta, resulted in great confusion as to the right of a seller to absorb freight, when not accompanied by conspiracy. The Federal Trade Commission—or at least, certain members of that Commission — have contended that what others regarded as dicta in the Cement Institute case was actually doctrine, and did amount to a judicial holding that the absorption of freight is per se illegal, at least when it results in any price discrimination.

The confusion which thus arose was considerably accelerated, immediately following the Supreme Court's decision in the Cement Institute case, when the circuit court of appeals at Chicago, in the Rigid Steel Conduit case (168 F. 2d 175) used this language:

> In the light of that opinion (referring to the Cement Institute case) we cannot say that the Commission was wrong in concluding that the individual use of the basing point method as here used does not constitute an unfair method of competition.

It is noteworthy that the individual use of the pricing practice involved in the Rigid Steel Conduit case included its use by two sellers, as to whom the Federal Trade Commission had expressly dismissed charges of conspiracy, thus adjudicating that these sellers were not using the practice pursuant to a conspiracy with other sellers.

In the light of the language used by the federal court the case was appealed, and a few weeks ago by a decision of 4 to 4 the Supreme Court affirmed the decision of the circuit court of appeals in the Rigid Steel Conduit case. Because of the tie vote no opinion was rendered, and no additional light was thrown on the subject. The urgency of congressional action on the subject was thereby increased.

It is obvious, of course, that if sellers may not absorb freight in the sale of commodities, the only alternative is to sell exclusively at f. o. b. mill or f. o. b. factory prices. A very thorough discussion of the effect on the national economy of required f. o. b. mill selling is contained in the interim report of the Committee on Interstate and Foreign Commerce, which is Senate Document No. 27 of the Eighty-first Congress; and I shall not take up the time of the Senate to go into that question here.

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Mr. MORSE, Republican, Oregon. Mr. President, I wish to discuss Senate bill 1008, which proposes a 2-year moratorium on the Supreme Court's decision on the basing-point issue, and in the interest of continuity I shall not yield until I complete my formal remarks. Then I shall be very glad to yield for questions.

I am perfectly aware of the fact that I am speaking for the RECORD this afternoon, but I think it of utmost importance that a record be made in opposition to the majority report on the pending bill.

Mr. President, if I were to give my address this afternoon a title I would headline it "The Attempts to Legalize the Basing-Point System: A Case Study in Propaganda."

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For nearly a year an effort has been under way to persuade the Congress to change the antimonopoly laws in such a way as to legalize the pricing practice of the steel industry, the cement industry, and various other monopolistic industries. The first goal of those who wanted the change was immediate amendment of the basic statutes. When they found they probably could not succeed in this aim, they decided to ask instead for a broad temporary moratorium on the enforcement of the

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statutes, apparently in the hope that if the Congress should enact such a moratorium its decision could be regarded as a promissory note to be paid off later by permanent legislation. When a sweeping moratorium ran into difficulties, the aim became still more modest —enactment of a limited moratorium now, but still with an implied promise of more legislation later.

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The strategy of the campaign was worked out quickly but not instantaneously; and it has left a clear trail in the trade press. On April 28, 1948, less than 48 hours after the Supreme Court decided the cement case, the *New York Journal of Commerce* carried an interview with Irving S. Olds of United States Steel Corp. Mr. Olds said that the United States Steel subsidiary, Universal Atlas Cement Co., would comply with the Court's order. Ignoring the pendency of the case in the Federal Trade Commission, in which it is charged that the steel companies are using the basing-point system to fix prices, he said that the basing-point system as used in steel did not result in any agreement among producers to use it, that any producer was free to use it or drop it, and that it was generally used as the most convenient way to sell steel. He took comfort in the fact that the Congress had not acted favorably upon past proposals to outlaw the multiple basing-point system, an inaction which he interpreted as a refusal; and he said that industry was faced with two alternatives, either to seek remedial legislation or to educate the Supreme Court.

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Although the idea of new legislation was born in the steel industry, the big companies of the industry were careful to avoid acknowledging their brain child. When hearings were held by the Capehart committee, no witnesses appeared from United States Steel Corp.; indeed, the company's only participation in the hearings was a reply by letter to a question addressed to it by the Senator from Indiana. Bethlehem Steel Co. abstained from appearing at the hearing, although it did send a similar letter in reply to a similar question. Republic Steel Corp., which was involved in both the Conduit case and the pending Steel case, did not participate in the hearings, but its chief engineer presented testimony contending that the continuous casting process developed partly by that company would not bring any great reduction in the costs of steel making. National Steel Co. and Jones & Laughlin, which were doing all they could behind the scenes to get the law amended, took no part in the hearings, except that National replied by letter to a question from the Capehart committee. The steel manufacturers were represented only by representatives of Inland Steel, Pittsburgh Steel, Continental Steel, and Sheffield Steel, and by an official of the Concrete Reinforcing Steel Institute, who apparently offered themselves as spokesmen for small business.

This same shyness has also characterized the other large companies against which the Federal Trade Commission has brought basing-point cases.

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This way of handling the matter reflected a carefully considered policy on the part of the large companies, far removed from indifference or resignation. Behind the scenes, they were vigorously pressing their customers to testify in favor of the legislation they wanted. Reports of such requests have come from enough different quarters to make it clear that a systematic campaign was conducted by the steel companies to drum up witnesses among the users of steel. Most of this effort appears to have been carried on by word of mouth, but nevertheless it has left clear traces. On September 13 the magazine *Steel* said that salesmen of National Steel Co. were suggesting to customers that they ask the Congress to take definite action to legalize basing-point selling. On September 21 *The New York Times* said that the president of Youngstown Sheet & Tube Co. had predicted a big drive on Congress to legalize the multiple basing-point system of selling steel, in which he expected thousands of steel consumers affected by the change to bring pressure upon Congress for legislation. In July, Ben Moreell, president of Jones & Laughlin, mailed a letter to every customer. The letter carried the title "The Right to Compete" and, after representing the company's pricing methods as being merely an effort to compete by absorbing freight and

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representing the Federal Trade Commission's basing-point cases as having made it unlawful to absorb transportation charges in order to meet competition, ended with this passage:

> We urge our customers and all others interested in the welfare of the country to give serious consideration to this matter. We believe that all will conclude, as we have, that prompt action by the Congress is essential if we are to continue to have the vigorous competition in this country which has been so fundamental to our national development.

Mr. Moreell's letter made no reference to the fact that the steel industry's pricing system which he described as competitive is now under attack in a Federal Trade Commission proceeding as a part of a price-fixing conspiracy.

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Under the conditions prevailing in the latter half of 1948, suggestions such as those contained in these letters had the practical effect of commands. Steel fabricators in most lines were trying desperately to operate their businesses in the face of a severe shortage of their basic raw material, steel. Producers of steel were rationing their customers and refusing to accept new customers. Black market prices were far above open market prices. Under these circumstances, to reduce or delay the supply of steel to any customer had the same effect as fining him the profits upon some portion of his business, and to discontinue his supply of steel might amount to a sentence of business death. It was inevitable that as soon as the steel manufacturers took a strong position with their critically situated customers in favor of basing-point legislation, many of their customers would echo the same sentiments, and customers who disagreed would at least avoid public mention of the fact. To a lesser degree the same situation prevailed in the cement industry.

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Propaganda was not the only means used to persuade the business community. The abandonment of basing-point selling by the steel industry last July was manipulated in such a way as to make the change objectionable to consumers and thereby strengthen the demand for legislation.

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The change to f. o. b. sales was made objectionable in several ways. First, although the base prices for steel had been set high enough to allow for the costs of freight absorption, these prices were not adjusted downward when freight absorption was abandoned. Instead, the full amount of the freight formerly absorbed was added to the price. Thus, prices were raised. Shortly after the change, base prices were substantially increased and though the industry did not represent this increase as due to f. o. b. mill selling, many consumers of steel could be counted on to connect the two changes.

F. O. B. SELLING

Second, the steel companies used the shift to f. o. b. mill selling as an excuse to complete their withdrawal from the territory in which they had formerly absorbed freight. In a sellers' market, with more demand than they could satisfy, they had found it unprofitable to absorb freight to make distant sales when they could sell nearby without absorbing freight, and the cost of the practice had been increased by higher freight rates. For this reason, steel companies had been steadily withdrawing from those markets in which freight was absorbed. A report by the Senate Committee on Small Business last February showed that by 1947, before the industry contemplated selling f. o. b. mill, this withdrawal had gone so far as to reduce the supply of steel to many parts of the country well below what it had been in 1940. The committee's report makes it clear that an effort to avoid absorbing freight was the principal influence in this change. But every such withdrawal brought protests from consumers who, when cut off by their former suppliers, could not persuade other producers to supply them; and in consequence a certain amount of freight absorption still existed in the early part of 1948. The change to f. o. b. mill selling gave the steel industry a chance to kill two birds with one stone. First, it got rid of the rest of its costly freight absorption and shifted the blame to the Federal Trade Commission; and, second, it converted the buyers who suffered from the change into an army of zealous supporters of the modification of the law which the steel industry desired.

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In September of last year, the public-relations firm of Ketchum, Inc., a subsidiary of Ketchum, MacLeod & Grove, of Pittsburgh, was employed by anonymous persons at a compensation of at least $11,000 a month plus expenses to get the law amended. It undertook to organize a so-called National Competitive Committee with chapters in Pittsburgh, Houston, Cincinnati, Dayton, Cleveland, Philadelphia, and Tulsa, and with other chapters contemplated in 17 other cities. At first this organization refrained from registering under the Lobbying Act, but finally did so on November 26. Executives of the public-relations firm replied to newspaper inquiries as to who supplied the money for the campaign by saying that they were not at liberty to give the names. *Iron Age* subsequently announced that the program was being financed by membership dues which ranged from $100 to $1,000 per member.

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LOBBY

This lobbying effort was one of the best organized, one of the most heavily financed, and one of the most adroitly deceptive that has ever been addressed to the Congress of the United States. It puffed up the desire of a few monopolists so that they seemed to be the voice of American business. It deceived a large part of business and a goodly number of the members of the Congress as to the nature of the law, the decisions of the courts, and the policy of the Federal Trade Commission. It almost succeeded in modifying the basic monopoly statutes of the United States so that they could no longer assure competition. This is an impressive achievement.

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The Federal Trade Commission's prosecutions and policies have been consistently represented as efforts to prevent businessmen from absorbing freight or from selling at delivered prices, with the objective of forcing all business to adopt a rigid practice of selling products f. o. b. mill. Through these representations, an effort has been made to persuade every producer in the United States, large or small, who is not selling f. o. b. mill already, that the Commission is trying to force him to change his pricing practices. The propaganda has implied that the Commission's attitude does not grow out of an effort to preserve competition, but is dogmatically applied even where the effect would be to reduce competition.

. . . . . .

Misrepresentation of the Commission's cases has reached its pinnacle with reference to the conduit case. Here the Commission's complaint had two counts. The first count charged a conspiracy on the part of the Rigid Steel Conduit Association and its members, including such concerns as General Electric Co., Youngstown Sheet and Tube Co., and Republic Steel Corp., to fix the prices of the steel pipe which is used in buildings as a container for electric wiring. This conspiracy was richly proved by many kinds of evidence. For example, the Commission's findings included a letter from a trade association official to a member of the industry who had filed a low price, which read in part:

> The filing of price lists, if these lists happen to be uniform, will assure all uniform quotations made on any inquiry, whether from the government or a private individual, but with the matter of the delivery charges left up in the air as it has been, there is room for differences. I am therefore calling for the filing of these delivery charge schedules.

The importance attached by the members of the industry to the maintenance of uniform delivery charges is indicated by an association rate bulletin which is also quoted in the Commission's findings. The foreword to this bulletin said:

> The freight rates listed herein are to be used to ascertain delivery charges in figuring f. o. b. destination prices to all points in the United States and their possessions. Where the freight rates shown are from Pittsburgh, Pa., the Pittsburgh basing prices must be used. If the freight rates shown are from Chicago or Evanston, Ill., the Chicago or Evanston basing prices must be used.

In 1937 the man who prepared the freight-rate bulletins suggested that henceforward the freight schedules be published and distributed by the individual companies. The Commission found that this change in form did not make any change in fact and that the bulletins were still intended for use as a common factor in pricing conduit. In November, 1939, a repre-

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sentative of one of the companies wrote to his associates:

Mark this interesting language:

> Please note this memorandum and destroy.

Mr. President, I believe in working out in the open, in public. When we run onto bits of evidence such as this, I believe we have a right thoroughly to consider the motivation behind such attempts as this propaganda represents to have Congress pass legislation of this type, which in my judgment will do serious injury to small business in the United States and will greatly intensify the monopolistic grip of a few businesses on the throat of the American free enterprise system.

Note this language:

> Please note this memorandum and destroy. There was a meeting of the various manufacturers of conduit in New York on November 16 at which all major manufacturers were represented except Triangle. . . . the dropping of the Chicago base was briefly discussed but it was decided not to do anything about it for the time being because of the possibility of investigation.

. . . . . .

The second count of the Commission's case was an effort to penetrate the camouflage which the industry had erected about its conspiracy. This count was clearly designed to enable the Commission to order the companies to quit observing the pricing formulas which they had developed to a point at which their conspiracy might be expected to work automatically. It was obviously intended to prevent the companies from continuing to do what they did before on the pretense that what had begun as conspiracy was now merely individual action. Its plain purpose was to let the Commission issue an order which could be enforced without the necessity of bringing a new charge of conspiracy and so, in effect, being required to try the original case all over again. This count charged that each of the members of the industry used the industry's basing-point system knowing that all the others were using it and knowing that the inevitable effect of this concurrent use would be to eliminate price competition and that in fact this industry-wide use of the system did eliminate price competition. Under this second count a conspiracy was not charged, but the facts set forth were enough to justify a charge of conspiracy. Finding that the count was sustained, the Commission used it as a basis for an order which forbade use of the basing-point method of pricing and of pricing practices akin to it by any respondent. As the Commission said:

> For the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers.

. . . . . .

To the question "Is the practical effect of the Commission's order in the Rigid Conduit case to require f. o. b. mill selling in that industry?" the Commissioner replied:

> No. It was intended, however, to have the practical effect of preventing the respondents in that proceeding from continuing to use the basing-point pricing system which had been established and maintained by conspiracy, or from substituting for it the industry-wide use of any other pricing formula which produced the same result, and thus nullifying the effect of the proceeding.

In the face of this record the propagandists for amendment of the laws against monopoly have persistently attempted to show that count two of the Conduit case is a part of an effort to require everyone in the United States to sell f. o. b. mill, and that it is a threat to every competitive business enterprise that does not already sell f. o. b. mill.

. . . . . .

But what is the Commission's own policy as set forth by it officially? On June 2, at the very outset of the controversy, Robert Freer, then Chairman of the Commission, testified before a Senate committee as follows:

> Certainly, it is unwarranted to assume that the effect of this (the cement) decision is to outlaw all delivered prices or to require only f. o. b. mill prices. The Cement case is simply a reaffirmation of a principle which is a fundamental one in the law and economics of this country that collusion and combination and conspiracy to fix and maintain prices is contrary to the American system of free enterprise. . . . . The Commission has no desire to suggest how prices should be quoted in any industry or to advise or participate in any decisions of business management.

On January 12 of this year the Commission

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made public a reply to questions from the Chamber of Commerce of the State of New York, one of which was whether the Commission favors imposition of f. o. b. mill pricing. The answer was:

> The Commission does not advocate the imposition of a requirement that business enterprises price their goods f. o. b. mill or that they use any other form of geographic pricing practice. In the Commission's opinion, one of the principal virtues of the antitrust laws is the fact that they maintain freedom of choice and variety of behavior among businessmen, favoring only the specific practices and conditions which have been condemned by law as destructive of competition.

COMMISSION POLICY

This statement by the Commission went further to indicate that the basing-point system is not regarded by the Commission as contrary to law in all cases. It said:

> It is the Commission's view that the law permits a single enterprise to use any pricing practice it may choose, including the quotation of delivered prices computed from one or more basing points, unless that practice involves price discriminations which injure competition within the meaning of the Clayton Act.

The propaganda has misrepresented the nature of the basing-point system and the bearing of the desired legislation upon it. I have already quoted from the trade press of the steel industry declarations that the industry's purpose is to restore the basing-point system just as they used it before. That is what the monopolists are after, and the Senate of the United States should not let them get by with it. Before the propaganda effort had become fully organized, the trade papers of the steel industry not only admitted this fact but pointed out that there was nothing in the recent decisions which outlawed freight absorption to meet competition. Thus on May 13, 1948, *Iron Age* carried an article by John Anthony of its editorial staff, which said:

> The metal industry is of the opinion that the (cement) decision does nothing to outlaw independent producer action to meet competitive prices at any delivery points.

. . . . . .

During the summer of 1948 the propaganda line was perfected. The offensive phrase "basing-point system" was discarded, and the pricing practices of the steel industry were represented as though they had been no more than merely absorbing freight where it was necessary to do so in order to meet competition. The letter from Ben Moreell, of Jones & Laughlin, which I have already quoted, said that this company would "discontinue pricing its products on a competitive basis through freight absorption." It said that the company took no issue with the Federal Trade Commission and the courts as to enforcement of the laws against price fixing and that—quoting from the letter of the president of Jones & Laughlin:

> We do not seek to perpetuate the basing-point system. We do not seek a rule which would permit the collection of phantom freight. All that we seek is the right to compete. In order to restore this basic principle, we believe it is essential that the Congress amend the applicable laws. There should be no statutory prohibition against charging lower mill prices to some customers than to others, when such low prices are necessary to permit products to be sold in a distant market to compete with another producer more favorably located with respect to that market.

Mr. President, that is a very interesting concept of free competition, that we should now fall for this line being offered in the Senate of the United States, that we should adopt the theory of the president of Jones & Laughlin, and obviously put to great disadvantage a small producer who, under our free competitive system, has placed himself in a position so that he can compete. Jones & Laughlin would take the advantage away from him. Since when has the American system of free competition reached the point that it should rest on the theory of uniformity from coast to coast and north to south so that the monopolists can take advantage of the small fellow who is trying to build his plant and develop his product in a locality or territory where the very location of the plant itself may give him a competitive advantage? . . . .

I care not what velvet words the president of Jones & Laughlin uses in his letter. His own language shows his intent, namely, to take advantage of the small producer who, under our competitive system, as the result of the location of his plant, may find himself

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in a position to compete with Jones & Laughlin.

On October 7 an article by Eugene Hardy, of *Iron Age,* made the strategy of this campaign in favor of freight absorption quite clear. He wrote that steel leaders were convinced that Congress would not legalize basing-point pricing or any other price system by name and that an effort to do so would require exhaustive definition which the Federal Trade Commission's attorneys might "misconstrue." He then said:

> Accordingly legislation to relieve the Commission of its weapons of attack on delivered pricing is receiving active consideration in steel circles.

He then mentioned three possible ways of accomplishing this result, one of which has subsequently become the basis of the industry's effort to persuade the Congress to legislate. It was to "make a clear legislative statement that any seller is privileged to make a lower price to meet a competitor's equally low price, and to do so as frequently and systematically as he wishes and without regard to whether his competitors may meet his and each other's prices."

As the distinguished Senator from North Dakota [Mr. Langer] has pointed out in his minority report on S. 1008, the effect of any such blanket authorization to absorb freight for the sake of quoting identical prices would be to legalize the entire mechanism of a basing-point system.

. . . . . .

Mr. O'MAHONEY, Democrat, Wyoming. Earlier this afternoon I announced that it would be my purpose to present a substitute for the bill which is the unfinished business.

. . . . . .

Let me say only that my feeling is that a mere moratorium is not sufficient to deal with the very substantial problem which confronts us. I feel that any law of Congress which is so ambiguous that the Supreme Court decides 4 and 4 with respect to its interpretation needs clarification. There is only one agency in the government, and that is the Congress, which can take the initial legislative steps necessary to clear away the ambiguity.

. . . . . .

There being no objection, the bill (S. 1974) to define the application of the Federal Trade Commission Act and the Clayton Act to certain pricing practices, introduced by Mr. O'Mahoney, was read twice by its title, referred to the Committee on the Judiciary, and ordered to be printed in the RECORD, as follows:

Be it enacted, etc.—

SECTION 1. That the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U. S. C. 45) is amended by adding at the end of section 5 (a) the following:

"It shall not be an unfair method of competition or an unfair or deceptive act or practice for a seller, acting independently, to quote or sell at delivered prices or to absorb freight, provided that this shall not make lawful any combination, conspiracy, or agreement, or any monopolistic, oppressive, deceptive or fraudulent practice or other practice violative of law, carried out by or involving the use of delivered prices or freight absorption."

SEC. 2. Section 2 (a) of an act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (38 Stat. 730, as amended; 15 U. S. C. 13), is amended by substituting for the period at the end thereof a colon and adding thereto the following:

"And provided further, That it shall not be an unlawful discrimination in price for a seller, acting independently

"A. to quote or sell at delivered prices if such prices are identical at different delivery points or if differences between such prices are not such that their effect upon competition may be that prohibited by this section; or

"B. to absorb freight to meet the equally low price of a competitor in good faith, and this may include the maintenance, above or below the price of such competitor, of a differential in price which such seller customarily maintains."

SEC. 3. Section 2 (b) of an act entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914 (38 Stat. 730, as amended; 15 U. S. C. 13), is amended to read as follows:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price the effect of which upon competition may be that prohibited by the preceding subsection, or discrimination in services or facilities furnished, the burden of showing justification shall be upon the person charged with a violation of this section, and

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unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, further,* That a seller may justify a discrimination by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

SEC. 4. As used in this act—

A. The word "price" shall have the meaning which it has under the commercial law applicable to the transaction.

B. The term "delivered price" shall mean a price at which a seller makes or offers to make delivery of a commodity to a buyer at any delivery point other than the seller's own place of business.

C. The term "absorb freight" shall mean to establish for any commodity at any delivery point a delivered price which, although as high as or higher than the seller's price for the same commodity at the point from which such commodity is shipped, is lower than the sum of the seller's price for such commodity at such point of shipment plus the actual cost to the seller for transportation of such commodity from such point of shipment to the delivery point.

D. The term "the effect may be" shall mean that there is a reasonable probability of the specified effect.

. . . . . .

OBJECTIVES

The number 1 objective, of course, is to avoid creating a new opportunity for monopolistic practices. The second objective is, to declare substantively in the law what the chairman of the Federal Trade Commission a year ago declared to be his understanding of the law, namely, that sales at delivered prices or freight absorption are not unlawful per se. There has been no doubt whatever with respect to the meaning of the law upon the part of Judge Ewan Davis, who has been the chairman of the Federal Trade Commission and who is now one of its most distinguished members. But without any question, after the decision in the Cement Institute case and after the decision in the Rigid Steel Conduit case, and after many conflicting explanations of the decisions and the laws upon which they were based, a great deal of confusion arose in the minds of people throughout the United States, both in industry and out of industry, among supporters of the antitrust laws, and among those who from time to time in the past have been accused of violating those laws. These then, Mr. President, are the two great objectives: to preserve the strength of the antitrust laws and to declare that delivered prices and freight absorption are not unlawful per se.

Before I discuss the bill at length, I should like to outline some of the changes which have come forth proceeded as a result of my discussion of the language of the bill with the Senators I have mentioned.

Mr. KEFAUVER, Democrat, Tennesee. Mr. President, will the Senator yield?

The PRESIDING OFFICER. Does the Senator from Wyoming yield to the Senator from Tennessee?

Mr. O'MAHONEY. I yield.

Mr. KEFAUVER. In discussing the objections which have been made to the bill (S. 1974), submitted by the distinguished Senator, some of us also had an objection to the provision of section 2 (b), on page 2.

Mr. O'MAHONEY. Mr. President, I have that in mind, and I shall discuss it in the course of my remarks.

Mr. KEFAUVER. Very well.

Mr. HILL, Democrat, Alabama. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. HILL. I understand the Senator is now going to explain the changes he has made in Senate bill 1974.

Mr. O'MAHONEY. That is correct.

Mr. HILL. That bill, as he has changed it, is the proposal which he is suggesting to the Senate. Is that correct?

Mr. O'MAHONEY. That is correct.

Mr. HILL. It is proposed to substitute it for the committee bill. Is that correct?

Mr. O'MAHONEY. It is proposed to substitute it for the committee bill, and I hope, since I have not had the time to prepare a copy of the bill with these changes, that a notation of them may be made by the clerk at the desk, so that when I offer the amendment in the nature of a substitute the changes will be in it. I shall trespass upon the patience of our friends at the desk in doing this, if I may.

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Mr. KEFAUVER. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. KEFAUVER. Did I correctly understand the Senator to say that with these amendments the sponsor of the original bill had agreed to the substitute, or was any statement made about that?

Mr. O'MAHONEY. No; I have not said that the sponsor has agreed to this substitute. I think that is the case, but I have not had direct word from him. The first change will be found on page 1, in line 9, where it is proposed to insert after the word "or" the word "collusive," so as to make it read, "that this shall not make lawful any combination, conspiracy, or collusive agreement." It is then proposed to insert a semicolon after the word "agreement," and proceed, "or any monopolistic, oppressive, deceptive, or fraudulent practice," and to strike out the words "or other practice violative of law."

Mr. HILL. Will the Senator advise us at this time of the effect of the changes....

Mr. O'MAHONEY. Let me put in all the changes, and then I shall be very glad to do so. There are not very many.

On page 4, line 6, strike out all the language appearing on line 6, and insert in lieu thereof:

> Evidence sufficient to convince a reasonable person that there is probability of the specified effect.

. . . . . .

Some other changes were suggested, but, upon consideration, I think it was felt by those assembled that they would not be necessary.

There was another amendment which I discussed. In connection with the definition of the phrase "absorb freight," the Senator from Indiana [Mr. CAPEHART] spoke to me about the provision on page 3, beginning in line 22. He felt that the language in the bill would not cover all the conditions which might arise. So I suggested to the Seantor that I should be very willing to insert at the end of that sentence on page 4, line 4, the words "or the average cost of transportation to the seller."

I shall now explain these various items.

EXPLANATION OF AMENDMENTS OFFERED TO PROPOSED AMENDMENT

The word "collusive" was inserted before the word "agreement" because it was suggested by the Senator from Maryland that the word "agreement" standing alone might include any perfectly innocent agreement. Of course, since the only purpose of this part of the bill is to make certain that nothing we are doing will make a collusive agreement lawful, I saw no reason to object to including that word.

The phrase "other practice violative of the law" was emphasized as being one of such breadth that it might be interpreted as giving the force and effect of law to rules or regulations which the Federal Trade Commission might lay down in the future. It was not intended to have any such effect; it was intended only to make certain that we should be closing the door to any practice which the ingenuity of those who look for ways and means of avoiding the antitrust laws might devise. But, in view of the words which preceded, I am quite willing to drop the phrase, "other practice violative of law."

The words which precede the phrase are "or any monopolistic, oppressive, deceptive, or fraudulent practice."

I think those four words pretty well cover the whole field of the activities prohibited by the antitrust laws, either because they describe practices which have already been found by the courts to be monopolistic in reported cases, or because they indicate practices which might be devised in the future which would have an effect upon competition contrary to the intent and the meaning of the antitrust laws. So, for that reason, I have no difficulty in going along with these suggestions.

With respect to the amendment on page 4, adding to the definition of the term "absorb freight," I may say that as it was originally written, this definition declared that the term "absorb freight" meant to establish for any commodity at any delivery point a delivered price, which, although as high or higher than the seller's price for the same commodity at the point from which said commodity is shipped, is lower than the sum of the seller's price for such commodity at such point of shipment, plus the actual cost to the seller for transportation of such commodity from such point of shipment to the delivery point.

It was pointed out to me—and as soon as

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it was pointed out I recognized it to be the fact—that there are producers of nationally distributed products who sell their products at a price determined by the cost at their manufacturing point plus the average cost of distributing the products to points throughout the United States. It is obvious that if a shipper in Washington, for example, should sell in Chicago at cost plus something less than the freight to Chicago, it might be a sum which would not cover the cost of production plus the cost of transportation to San Francisco. Since it is customary practice in such cases for the producer to average the prices, I had no objection.

I think that covers the various amendments which have been discussed and suggested.

PRICE DIFFERENTIAL AMENDMENT

The Senator from Tennessee and the Senator from Louisiana have discussed with me the effect of the provision to be found on page 2 beginning in line 16. In order that my discussion may be intelligible I think probably I should read the entire amendment. This is a part of section 2 which is designed to provide an amendment to sec. 2 (a) of the Clayton Act. The amendment of the Clayton Act reads as follows:

> *And provided further,* That it shall not be an unlawful discrimination in price for a seller, acting independently—
>
> A. to quote or sell at delivered prices if such prices are identical at different delivery points or if differences between such prices are not such that their effect upon competition may be that prohibited by this section; or
>
> B. to absorb freight to meet the equally low price of a competitor in good faith, and this may include the maintenance, above or below the price of such competitor, of a differential in price which such seller customarily maintains.

The fear was expressed by the Senator from Louisiana that this might open the door to a restraint upon trade, a restraint upon competition, by making it possible for the seller to sell to Purchaser X at a differential which he would not give to Purchaser Z, and thereby operate intentionally to restrain the trade of Purchaser Z. Have I not correctly stated the question raised by the Senator from Louisiana?

Mr. LONG, Democrat, Louisiana. That is what I had in mind.

Mr. O'MAHONEY. My answer is that in my judgment there are three words in the section which obviate that interpretation. The first two of these words, "good faith," are to be found in line 17, and the entire clause reads, "The absorption of the freight must be made to meet the equally low price in competition in good faith."

The third word is to be found in line 20, namely, "customarily." The differential which is mentioned here must be one which such seller customarily maintains. So, in my judgment, it would be impossible, under this language, to produce the sort of condition the Senator fears.

Mr. LONG. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. LONG. In regard to the condition of good faith, would it not be true that in the absence of proof to the contrary good faith would be presumed? Every time I have seen the phrase "good faith" used it has been presumed that the burden of proof is on the person on the other side to prove that the action was not in good faith. Would not that be the rule here?

Mr. O'MAHONEY. Perhaps it might be, but we have been very careful to make it clear that the government is not prohibited from charging a monopolistic practice.

Mr. LONG. It is easy to charge, but very difficult to prove.

Mr. O'MAHONEY. But when the seller uses a differential which is different from that which he customarily maintains, I think there will be no difficulty.

Mr. LONG. Suppose there are two firms competing, let us say, in retail business. We will call them A and B. Let us assume there are two firms which are suppliers, to these two, and let us presume they are wholesalers, or producers, and we will call the latter C and D.

Suppose suppliers C and D provide supplies to A at half the cost at which they are supplying to B in order that A may run B out of business. The Federal Trade Commission goes to C and D and says, "You cannot maintain this price at one-half to A that is enabling him to run B out of business." Then C says, "I am selling at one-half to A because my competitor, who is also a wholesaler, is selling to

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him at that price, although neither of us is giving the other man the same discount." Would not both men be in the clear, and be in such position that the Federal Trade Commission could not act?

Mr. O'MAHONEY. I think the case the Senator states is contrary to both the provisions I have mentioned. First, it would not be a customary differential.

Mr. LONG. Actually would it not be contemplated, within the meaning of this amendment, that any time a man lowered his price to meet competition he would be in good faith in meeting a competitor's price? Would not that itself prove good faith?

COMPETITION

Mr. O'MAHONEY. Of course, we are here trying to preserve competition, and I do not understand that the Senator wants to change the law so as to make it difficult to compete. If the competition is in good faith, if it is designed for the purpose of distributing the goods which are produced, and if it is not in any way for the purpose of restraining trade, or applying some monopolistic pressure or oppression to an individual, we have no complaint. But I say to the Senator that if there should be a situation such as he has described, in which the change was made for the purpose he described, namely, driving someone out of business, it would be very apparent, in my judgment, that it would be clearly cognizable under the law.

Mr. LONG. It is my point that in the particular case I have described to the Senator there would be two wholesalers, let us assume, C and D, competing with one another in good faith, but the effect of what they were doing would be to help A drive B out of business. It is a case in which both are in good faith, at least to all intents and purposes. Only a crystal gazer could prove what was in their minds. Would not the immedaite effect be to drive one man out of business? As I understand the Federal Trade Commission law, it would enable the Commission to require that either C or D prove that they were justified, that one of the two was justified, in going to a lower price in discriminating against one of the two competitors who were retailers.

. . . . . .

Mr. O'CONOR, Democrat, Maryland. Is not the answer to the Senator from Louisiana the statement that the Federal Trade Commission would still have a remedy against C who initiated the practice for the improper purpose of driving A out of business, so that there would be ample redress and remedy against C?

Mr. O'MAHONEY. I was about to make such a statement. I now yield to the Senator from Tennessee.

Mr. KEFAUVER. I am sure the Senator knows that the assumption of the Senator from Maryland is something that does not work out in actual practice, and I feel certain that the Senator from Wyoming must realize that this subsection B, on page 2, as now written might literally mean the ruination of competition insofar as small businesses were concerned, because I ask the Senator if it does not change the ruling under which the Federal Trade Commission now operates.

Mr. O'MAHONEY. I do not think it changes any ruling to bring about any such effect as the Senator describes.

Mr. KEFAUVER. Let me call the Senator's attention to the chart I have here. If A is a large consumer, and is buying something from B at, let us say, $10 a ton, and he is charging all the small customers—X, Y, Z, L, M—$15 a ton, C can come along, even though he is at a distance and absorb freight and sell also to A at $10 a ton. If the Federal Trade Commission tried to prosecute C under the Clayton Act the fact that B was charging $10 a ton in his sales to A would be a complete defense. That is, the showing that another seller was charging the same price would be a showing of good faith under the language of subsection B of the bill. Is not that true?

Mr. O'MAHONEY. No; I am not ready to agree with that statement. I will say to the Senator from Tennessee that I do not believe the present law undertakes to preserve the status quo in any line of business. Without question there are some purchasers of commodities from wholesalers who do not operate as efficiently or as economically as others, and the price at which they have to buy their material may be such as to make it impossible for them, by reason of their inefficiency, to operate at a profit. It is not the purpose of the existing law to compel the preservation in

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business of those who are suffering because of lack of efficiency.

Mr. KEFAUVER. Of course, the fact that A may buy in greater quantity or that different conditions may exist has always been a defense in a case before the Federal Trade Commission.

Mr. O'MAHONEY. And still is.

Mr. KEFAUVER. And still is. But the fact that the small fellow may be undercut by 50 per cent under the present regulation of the Federal Trade Commission is not a defense because it is a discrimination, even though two or more may be selling A at the same price. The reason that is so is that the United States Circuit Court of Appeals, as the Senator well knows, recently, in its January session, held by unanimous opinion— and the case is now before the Supreme Court— that if B is selling A on the basis of $10 a carload, and C starts selling A at $10 a carload, whereas they sell the little fellows at $15 a tankload of gasoline or a carload, the mere fact that they are selling A at the same price does not meet the requirements of the Robinson-Patman Act—that is, if there is unfair competition or discrimination, even though they may be selling A at the same price, they are still guilty of violation of section 2 of the Clayton Act, which is the Robinson-Patman Act. I have the opinion here before me, and it states in very clear terms——

Mr. O'MAHONEY. To what case is the Senator referring?

Mr. KEFAUVER. I am referring to docket 4389 in the United States Circuit Court of Appeals.

Mr. O'MAHONEY. I do not know the docket number, but will the Senator give me the name of the case?

Mr. KEFAUVER. Standard Oil Company against Federal Trade Commission, decided on March 11, 1949.

Mr. O'MAHONEY. I will say to the Senator, with respect to that question, that without any doubt, if the absorption was made in good faith, the particular injury to a particular person under such a case as was proved there probably would not be covered. I must acknowledge that to the Senator.

Mr. KEFAUVER. May I read to the Senator what the court felt about the practice that was taking place in this case? . . . .

> The petitioner had given a club to its wholesalers which they passed on to their retailers to bludgeon their competitors. This is what the Commission is trying to stop, and it is toward the elimination of this evil that the cease-and-desist order is directed.

That is the law today. That law is necessary if we are going to protect the small consumers against unlawful discrimination under section 2 of the Clayton Act, and I do not want to see that protection taken away from them. I grant that there are differences because of the amount some may buy, or because of methods or business operations, or something of that sort. But when B happens to have been selling A at $10, and C comes along and does the same thing, whereas they are selling to their small customers at 50 or 100 per cent more, that is going to put the little fellows out of business. I do not think meeting that competition which may have been established for the purpose of putting these little fellows out of business in the first place should be considered good faith. I think it takes away whatever protection there may be to small business. It takes away a remedy the Federal Trade Commission can now enforce. If anyone will read the decision of the court in this case, he will agree that the Federal Trade Commission needs the power that is defined in the Standard Oil case, decided on March 11, 1949.

Mr. CAPEHART, Republican, Indiana. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield to the Senator from Indiana.

Mr. CAPEHART. Is it not a fact that we are talking about freight costs and freight absorption?

Mr. O'MAHONEY. I beg the Senator's pardon.

Mr. CAPEHART. We are dealing in terms of transportation costs, and not with general prices. In other words, in paragraph B on page 2 of the Senator's bill we find the words "to absorb freight to meet the equally low price."

The danger the able Senator from Tennessee points out, in my opinion, is not covered in either one of the two paragraphs A or B, because we are dealing in terms of the transportation cost only. Then if we look at paragraph A carefully we find it to say,

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"to quote or sell at delivered prices if such prices are identical at different delivery points."

Meaning that no man could sell to customers in New Orleans, for example, at different prices. He must sell every one in New Orleans at exactly the same price. I will read the language again:

> A. to quote or sell at delivered prices if such prices are identical at different delivery points.

So we are dealing in transportation costs and not in the price of the article. But they must be the same at all points.

Mr. O'MAHONEY. The Senator from Indiana is talking about the provision governing delivered prices, and not the provision in paragraph "B" of absorbing the freight, to which the Senator from Tennessee alluded.

There is no doubt, as I said to the Senator, that paragraph "B" would have that effect under the conditions existing in the Standard Oil case he mentioned. This is the first time any Member of the Senate has spoken to me about that provision and, of course, the Senator is perfectly free to suggest an amendment with respect to it.

AMENDMENT WILL NOT CHANGE PROOF OF CONSPIRACY

For the present, Mr. President, I should like to add one or two statements explanatory of my purpose in offering this provision. The problem was first raised when the Supreme Court decided the Cement Institute case. The decision was handed down on April 26, 1948, and immediately resulted in an announcement by United States Steel that it was going to abandon the basing-point system which had been followed prior thereto. Other statements were made immediately that the result of this decision was to compel f. o. b. pricing, that is to say, would compel all producers to sell at their mill net, and would render illegal either delivered prices or freight absorption.

At the time when I was queried about this by the press I expressed the opinion that such was not the case, and that it was absolutely essential, even under that decision, to prove a conspiracy. There are numerous statements in the decision which bear out this point of view. The court was referring to the comparison which the defendants in the case made between the attack upon the Cement Institute by the Federal Trade Commission, and what was known as the Old Cement case, which involved the Sherman Act. The court said in distinguishing between the two cases:

> In the first place, unlike the Old Cement case, the Commission does here specifically charge a combination to utilize the basing-point system as a means to bring about uniform prices and terms of sale.

A little bit later on, again discussing the Old Cement case and delineating the basic problem, the court said—and used that very phrase:

> That basic problem is whether the Commission made findings of concerted action, whether those findings are supported by evidence, and if so, whether the findings are adequate as a matter of law to sustain the Commission's conclusion that the multiple basing-point system, as practiced, constitutes an unfair method of competition because it either restrains free competition or is an incipient menace thereto.

It will be observed that findings supported by evidence of concerted action were here specifically required.

A little later the Supreme Court, in the same decision, made a similar reference:

> Thus we have a complaint which charged collective action by respondents designed to maintain a sales technique that restrained competition, detailed findings of collective activities by groups of respondents to achieve that end, then a general finding that respondents maintained the combination, and finally, an order prohibiting the continuance of the combination.

Observe this language:

> It seems impossible to conceive that anyone reading these findings in their entirety could doubt that the Commission found that respondents collectively maintained a multiple basing-point delivered price system for the purpose of suppressing competition in cement sales.

In the same case the Court cited the practice of cement producers submitting identical bids. Even when the Government of the United States asked for bids for supplying cement, identical bids were submitted, which were carried out to the sixth decimal point. In a note the Court gave an example:

> The following is one among many of the

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Commission's findings as to the identity of sealed bids:

An abstract of the bids for 6,000 barrels of cement to the United States engineer office at Tucumcari, N. Mex., opened April 23, 1936, showed the following:

Name of bidder:	*Price per barrel*
Monarch	$3. 286854
Ash Grove	3. 286854
Lehigh	3. 286854
Southwestern	3. 286854

It went on through the United States Portland Cement Co. Oklahoma, Consolidated, Trinity, Lone Star, Universal, and Colorado. Each one submitted the same identical bid, carried out to the sixth decimal point.

In seeking to draft this legislation my purpose was to make it quite clear that, although we were saying that sale at delivered prices was not unlawful, we were careful to make clear that if there should appear a situation such as this, in which identical bids were submitted, carried out to the sixth decimal point, it should be a signal to the government to look into the question of whether or not there was a conspiracy.

. . . . . .

Mr. LUCAS, Democrat, Illinois.

. . . . . .

Does this amendment protect the legality of delivered prices and freight absorption used independently of price-fixing schemes and without giving aid or comfort to monopolies?

Mr. O'MAHONEY. Precisely. That was the whole intent and purpose which I had in offering this substitute.

Mr. LUCAS. The man who continually looks toward monopolies is the big fellow who, as a general rule, takes care of himself pretty well. It is the little fellow who is always hurt. As I understand, that is the individual whom we are trying to protect. . . .

I should like to ask the Senator one further question. Does this amendment protect, likewise, the legality of normal price differences under the Clayton Act without legalizing injurious and monopolistic price discriminations?

Mr. O'MAHONEY. It is my opinion that it does. However, in all fairness I must say that I think the question which the Senator from Illinois has now propounded to me raises the same point which was first raised by the Senator from Louisiana [Mr. LONG] and the Senator from Tennessee [Mr. KEFAUVER]. I believe that the substitute will work in substantially the way the Senator has indicated by his question; but unquestionably by authorizing freight absorption, when made in good faith, the substitute has the effect of changing the point of view which was expressed in the Standard Oil case just quoted by the Senator from Tennessee.

Mr. LUCAS. The amendments about to be proposed by the Senator from Wyoming in no way are in conflict with the Supreme Court decision; are they? Am I correct as to that?

Mr. O'MAHONEY. They are not at all in conflict with the Supreme Court decision.

COURT DECISION

Mr. LUCAS. In other words, the proposed amendments will not nullify the Supreme Court decision in any way; will they?

Mr. O'MAHONEY. They will not.

Mr. KEFAUVER. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. KEFAUVER. I certainly wish to join the Senator from Wyoming in trying to work out this matter in a satisfactory way. I know of his long fight to protect the free-enterprise system by trying to prevent monopolistic practices, and I know of his support of the Clayton Act, the Robinson-Patman Act, and anti-monopoly measures in general.

I wish to ask about the proposed amendment, on page 4. As the amendment has been printed, it reads as follows, beginning in line 5, on page 4:

> D. The term "the effect may be" shall mean that there is a reasonable probability of the specified effect.

I understand that the amendment is now proposed to be amended or modified so as to read as follows:

> D. The term "the effect may be" shall mean that there is evidence sufficient to convince a reasonable person that there is probability of the specified effect.

Is that correct?

Mr. O'MAHONEY. The Senator has correctly quoted the amendment. As I understand

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the amendment, it was originally proposed because there was entertained, though probably not on the part of any Senator, a suspicion that perhaps the staff of the Federal Trade Commission might be unduly agile and astute, and that the words "that there is a reasonable probability" might give the Federal Trade Commission more power than it now has.

I find that I myself entertain a reasonable fear that there are on the staff of monopolistic companies some very astute lawyers who know their way around a legal conundrum or dilemma. But as I see the matter, the substitute phrase means exactly what the original language of the amendment meant.

Mr. KEFAUVER. That being the case, let me ask the distinguished Senator who proposed the substitute phrase whether he thinks it will weaken the powers of the Federal Trade Commission. I am sure he does not believe it will weaken the Commission's powers.

Mr. O'MAHONEY. Oh, no.

Mr. KEFAUVER. Then let me say to the Senator that all of us know that the present rule of law, since the N.L.R.B. decision and other decisions affecting legislation beginning about 1935, is that if a finding by an administrative agency, such as the Federal Trade Commission, is sustained by any evidence, it shall not be reviewed in the appellate courts or the Supreme Court. In other words, as the Federal Trade Commission, its findings of fact and its orders based on such findings are not reviewable in the Supreme Court if there is any evidence whatsoever to sustain them. I understand that is the position the Supreme Court takes.

I am afraid the proposed amendment of the amendment, by way of the insertion of the words "evidence sufficient to convince a reasonable person that there is probability" would make any finding of fact by the Federal Trade Commission reviewable by the upper court—in other words, that the case could be tried all over again in the appellate court or the Supreme Court, after the Federal Trade Commission had made findings of fact. Otherwise, why should there be the more-or-less double statement "evidence sufficient to convince a reasonable person that there is probability?" That is a matter which the Supreme Court would have to decide in every case coming to it from the Federal Trade Commission. In that event, the Court would have to decide, not whether there were sufficient facts to sustain the finding of the Federal Trade Commission, but whether there were facts or evidence "sufficient to convince a reasonable person." In that event, the entire hypothesis of the appeal would be completely changed, for as the law now stands, there must be some evidence which would convince the Federal Trade Commission; and if there is, the facts cannot be gone into in the appellate court.

But under the proposed substitute, we would get away from the Federal Trade Commission, and would substitute "a reasonable person," and that would make the matter reviewable by the Supreme Court. At least, I am afraid that would be the result of the language proposed.

I wish to ask the Senator whether he has considered that possibility or if it has been reviewed by the Department of Justice or some other agency.

Mr. O'MAHONEY. I am frank to say that I had not considered that possibility. I felt that the phrase "that there is a reasonable probability" would be subject to exactly the same interpretation as the substitute phrase which was suggested.

Mr. KEFAUVER. I wish to ask the Senator about that. Of course, I may be mistaken about the meaning; but I simply wish to be certain that that phrase will not do what I am afraid it might do. I wonder whether it would be well to put this matter over until tomorrow, so that we can obtain from the Attorney General or from some other authoritative source an opinion in regard to the possible effect of this provision.

Mr. O'MAHONEY. As I said last night when I submitted the substitute for printing in the RECORD, I did so for the purpose of making it available as soon as possible to anyone who had any point of view or any knowledge with respect to this problem, and at that time I invited criticism of the measure. I still have exactly the same opinion. I am not inclined to believe that it was intended by this amendment to change the basic law in regard to the Federal Trade Commission.

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Let us look over the measure, however, to see where this proposal would apply to it.

Mr. KEFAUVER. I should like to ask another question: Is not the usual language in such cases, when dealing with questions of the weight of the evidence—which is really the subject matter of sub-section D—and the usual language so far as the matter of review is concerned, whether there is "reasonable probability" or whether there is "substantial evidence?" I believe that the present rule of law, so far as the Federal Trade Commission is concerned, is that its findings of fact shall not be considered or reviewed by an appellate court, but shall be binding on the appellate courts or on the Supreme Court if there is any evidence or a reasonable probability of evidence of the specified effect.

F. T. C.

Mr. O'MAHONEY. I say to the Senator from Tennessee that I have no intention whatsoever of altering the Federal Trade Commission Act or the Clayton Act in that respect.

Mr. KEFAUVER. I know the Senator from Wyoming does not have such an intention, but I wished to express alarm as to the language of the proposed substitute.

Mr. O'MAHONEY. I am very glad the language is being scrutinized as carefully as it is. I should be very happy to consider any amendment which would be designed to clarify that point in my amendment.

Mr. HUMPHREY, Democrat, Minnesota. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. HUMPHREY. I should like to ask what it is in the three cases which have been brought to the attention of the courts, and recently have been reviewed or acted upon by the Federal Trade Commission, which makes necessary either the proposal contained in Senate bill 1974 or the provisions of Senate bill 1008. What is it in the decision, for example, in the Cement Institute case or the decision in the Staley case or the decision in the Steel Conduit case which necessitates a moratorium provision such as is proposed in Senate bill 1008 or in the amendment submitted by the Senator from Wyoming?

Mr. O'MAHONEY. I say to the Senator from Minnesota that from my point of view a moratorium would be unwise. It is because I feel that it is unwise and against the public interest that I seek the adoption of the substitute language.

I shall explain to the Senator precisely why I think some action is necessary. Nothing in the Cement Institute case, so far as I can see, should have occasioned anyone any concern. The Cement Institute case is sound law and should be accepted as such. But immediately after it was announced it was misinterpreted. I entertain the belief that in some cases it was deliberately misinterpreted.

Mr. HUMPHREY. Is it not true that under the Cement Institute case there is no law which prevents freight absorption where there is a competitive situation?

Mr. O'MAHONEY. Precisely. When I began my explanation I pointed out that in the Cement Institute case, over and over and over again, the Court referred to concerted action.

Mr. HUMPHREY. That is correct.

NEED FOR BASING-POINT LEGISLATION

Mr. O'MAHONEY. That is the gravamen of a monopolistic practice, a concerted action. But, to answer the Senator's question, the difficulty as I saw it came when the Rigid Steel Conduit case was decided. There the Federal Trade Commission brought its complaint in two counts. In the first count it clearly and explicitly charged conspiracy. In the second count the charge of conspiracy was not as clearly set forth. Some who read it said it was not set forth at all. But, in any event, the defendants, who appealed from that decision, did not appeal from the findings on the first count, but only upon the second count. So that when the case went to the Supreme Court, with one of the Justices disqualifying himself, there was a division.

Mr. HUMPHREY. There was a division, four against four.

Mr. O'MAHONEY. There was a division, four against four, and the result was that the Supreme Court did not pass upon the case. Therefore, the decision of the circuit court remained the decision of the courts. But since the appeal to the Supreme Court was made only upon the second count, and the question there was whether there had been an allega-

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tion of conspiracy, therefore the question presented was whether an independent absorption of freight or independent delivered price was a violation of the law. Since the Justices of the Supreme Court divided four against four, it seemed clear to me that the only possible relief that we could give was to speak clearly in Congress, stating what the Federal Trade Commission has said from the beginning, namely, that independent action without conspiracy is not prohibited.

Mr. O'CONOR. Mr. President, will the Senator yield at that point?

The PRESIDING OFFICER. Does the Senator from Wyoming yield to the Senator from Maryland?

Mr. O'MAHONEY. I am very happy to yield.

Mr. O'CONOR. Is it not true, in connection with the question just asked by the Senator from Minnesota [Mr. Humphrey], that as the result of that situation another case might originate tomorrow, wherein a circuit court of the United States would decide exactly opposite to what the seventh circuit found in the Rigid Steel Conduit case?

Mr. O'MAHONEY. I am glad the Senator has mentioned that.

Mr. O'CONOR. Assuming that the same eight Justices of the Supreme Court would sit and would follow their philosophies, as would be expected, they would have to affirm that decision of the circuit court of appeals, with the result that two diametrically opposite decisions would have been rendered, and both would have been affirmed by the Supreme Court of the United States.

Mr. O'MAHONEY. Of course, "affirm" is not the word.

Mr. O'CONOR. When I say "affirm," I mean, allow to stand.

Mr. O'MAHONEY. That is correct. It would be allowed to stand. The four Justices of the Supreme Court who felt in the Rigid Conduit case that the independent producer was prohibited from absorbing freight without a charge of conspiracy would stand by their opinion, and the four who felt the opposite way would stand by theirs. We would as a result have two opposite rules of law in different circuits, and that situation could spread throughout the United States.

Mr. O'CONOR. If I may ask just one further question in that connection, is not this, therefore, if not the only way, at least the best way by which to correct that situation, and to establish definitely what is the right doctrine?

Mr. O'MAHONEY. It is the only way. I am glad the Senator asked that question, because it enables me to answer another question of the Senator from Minnesota, in connection with the moratorium bill. The moratorium would amount only to a declaration by the Congress, if it were enacted—and I do not think it would be enacted—that until July 1, 1950, no court could construe the existing law against the rule stated in the moratorium bill; that no court could hold that there was a violation of law when freight absorption was found to be used for the purpose of engaging in competition in good faith. Some questions might arise. I know that the committee in reporting the moratorium bill intended by their language to maintain competitions and obviate the necessity for litigation, but there still remained the possibility of new opportunities for legal discussion and debate.

PERMANENT LAW PROMOTES INDUSTRIAL DEVELOPMENT

But the fact about it which has given me the greatest concern is that a moratorium would amount to a "road block" against the investment of any sum by any independent in an industry in which circumstances might compel him or might make it seem desirable for him to use freight absorption or delivered prices. Such a situation would stop the development of industries in the West as well as in the East and in the South. It would bring about a condition which would prevail until 1950, until the Congress would again review the matter and decide whether freight absorption or delivered prices were to be condemned.

Mr. HUMPHREY and Mr. O'CONOR addressed the Chair.

The PRESIDING OFFICER. Does the Senator from Wyoming yield; and if so, to whom?

Mr. O'MAHONEY. I yield to the Senator from Minnesota.

Mr. HUMPHREY. Then as I gather, the Senator from Wyoming is proposing his

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amendment primarily upon the decision or the failure of decision, or the lack of decision, in the Rigid Steel Conduit case.

Mr. O'MAHONEY. Exactly.

Mr. HUMPHREY. That applies to the independent distributor or producer or wholesaler, whether acting in conspiracy or not. Is that correct?

Mr. O'MAHONEY. And I may say to the Senator that in that case the Circuit Court of Appeals found there was a combination.

Mr. HUMPHREY. That is correct.

Mr. O'MAHONEY. I think I should read a portion of that decision into the record, so as to make the matter clear:

> It also appears that instead of petitioner conduit sellers using an absolute Pittsburgh-plus system for all designations in their price quotations, they collectively discussed and considered the matter of maintaining and utilizing Chicago as a basing point, with its differential over Pittsburgh, and that until 1930 they followed a method of calculating delivered price quotations which provided for discounting from the Pittsburgh or Chicago base price, depending upon which base price and accompanying discount produced the lower figure at the customer's destination, and that during 1930—

Observe this language, Mr. President—

> representatives of petitioners at a meeting of the rigid steel commodity section of the National Electrical Manufacturers' Association determined upon a change from that method to the one they now use. (168 Fed. Rept., 2d series, 177.)

So here was the clear finding of a meeting, of an agreement—I might also say, a conspiracy, but I will not—but certainly there was a meeting or an agreement, and in this bill I have taken care to make certain that if there be a meeting or an agreement or a conspiracy, the power of the Federal Trade Commission remains absolutely undisturbed.

Mr. HUMPHREY. However, it is not the Senator's opinion that, had they acted independently without this understanding and this apparent approval of the method which they were using of collaborating, there would not be any action on the part of the Federal Trade Commission?

Mr. O'MAHONEY. That is correct. The Federal Trade Commission in my judgment would not have acted. But the unfortunate fact was that the allegations were presented in such a form that when the appeal was taken from only one count, the second count, it raised this issue.

Mr. HUMPHREY. That is correct. Is it not true that they took out the second count because they felt that that also embraced the charges of conspiracy in the first count?

Mr. O'MAHONEY. Judge Davis said so in a letter which has been made public.

Mr. MYERS, Democrat, Pennsylvania. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I shall be glad to yield to the Senator from Pennsylvania.

Mr. MYERS. Do I correctly understand from the Senator's former statement that his fundamental objection to the moratorium bill is that it will make necessary, a year hence, going through the same procedure again?

Mr. O'MAHONEY. Exactly.

Mr. MYERS. The Senator does not have a fundamental objection to the contents of the moratorium bill, but believes that it should be made permanent, in order that new enterprises may seek to go forward and use the freight-absorption method of doing business. Is that correct?

Mr. O'MAHONEY. Precisely. I know the objective of the Senator from Pennsylvania, the Senator from Maryland, and all who have been sponsoring the moratorium bill is the same as I intend, namely, to make sure that delivered prices and freight absorption shall not be deemed illegal per se, and that it is desired in nowise to legalize monopolistic conspiracies to restrain trade or to fix prices.

Mr. MYERS. And that is also the purpose of the Senator's proposed substitute.

Mr. O'MAHONEY. That is correct.

Mr. MYERS. The Senator's proposed substitute merely seeks to make permanent that which the moratorium bill sought to make temporary.

Mr. O'MAHONEY. That is correct.

Mr. KEFAUVER. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield to the Senator from Tennessee.

Mr. KEFAUVER. A few moments ago we were discussing the effect of the proposed amended language in section 4 (d). I asked the Senator if he wanted to change in any

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way the present status of the Federal Trade Commission Act or of the Clayton Act with reference to the reviewability of testimony on the facts by the Supreme Court.

SCOPE OF REVIEW OF FTC DECISIONS

Mr. O'MAHONEY. And I said "No;" I did not.

Mr. KEFAUVER. The Senator definitely said "No," and I am certain that very few of us want to change the present situation, if there is any substantial testimony to sustain the findings of the Federal Trade Commission. I find, in examining section 5 of Public Law 203, Sixty-third Congress, which is the act establishing the Federal Trade Commission, that in prescribing the method of review it provides:

> The findings of the Commission as to the facts, if supported by testimony, shall be conclusive.

I also find, on examination of section 11 of the Clayton Act, which is Public Law 212, Sixty-third Congress, it provides that on an appeal from a finding by the Federal Trade Commission to the Supreme Court—

> The Commission or Board may modify its findings as to the facts or make new findings by reason of the additional evidence so taken, and it shall file modified or new findings which, if supported by testimony, shall be conclusive.

There is no doubt in my mind that the suggested new language changes that situation.

Mr. O'MAHONEY. It was not intended to change it. I think perhaps we could change it back, if it has been changed, by saying, in line 5, page 4, "evidence to support the specified effect."

Mr. O'CONOR. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield to the Senator from Maryland.

Mr. O'CONOR. I may say to the Senator from Tennessee that I think there may be some misconception with respect to the matter. Reference has been made to the scintilla-of-evidence rule which we think no longer applies. Certainly, under the Administrative Procedure Act, there must be substantial and probative evidence, and there must be evidence showing that there was substantial backing and support for the administrative ruling.

Mr. KEFAUVER. The language refers to the phrase "effect may be." That is, the effect of the freight absorption or what not. It says:

> May be a reasonable probability of the specified effect.

I think that is as far as we should require the Federal Trade Commission to go. Of course, the Administrative Procedure Act is read into the appeal provisions of all the other acts; but to require the Federal Trade Commission to prove that the effect may be to the satisfaction of a reasonable person, on the weight of the evidence, completely carries the whole burden of the evidence to the Supreme Court and would end in litigation which could never be terminated.

So I think the language in the original provision is as it should be, and I certainly expect to object to any change in the original language.

A. P. A.

Mr. O'MAHONEY. The language of the Administrative Procedure Act, which, of course, is now the law, is, as I understand, "substantial and probative evidence." So I think the objection of the Senator from Tennessee would be met by altering the amendment on page 4, line 6, to read as follows:

> Is substantial and probative evidence of the specified effect.

That would be a declaration of existing law.

Mr. KEFAUVER. The question here is what shall be required of the Federal Trade Commission to prove the effect of certain things that have been done. I think that if it shows there is a reasonable probability of the specified effect happening in the future, there may be some cases in which they cannot show by substantial evidence that a thing has taken place. In other words, they may be trying to take an event which has occurred and catch it at the beginning, before there is evidence of the actual harm which may have resulted.

Mr. O'MAHONEY. I will say to the Senator, as I said at the beginning, that I was agreeable to the suggested amendment, because I thought it made no change in the meaning of the definition as I originally proposed it. I was disturbed when the Senator

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pointed out that he felt it would bring about a change in the existing Federal Trade Commission law. I was overlooking the fact that the law has already been altered by the Administrative Procedure Act. When the Senator from Maryland called attention to that fact and cited the words of the statute, "substantial and probative," it occurred to me that if the Senator from Tennessee does not want to change the substantive law, he will agree with me that we should not change it one way or another, particularly when it is borne in mind that our whole purpose is to bring this controversy to an end and make a declaration of purpose, such as that which the majority of the Federal Trade Commission have announced over and over again, so we may remove any danger of a road block from the path of independent enterprise in the United States.

Mr. KEFAUVER. I might be satisfied to accept the language of the Administrative Procedure Act if I were convinced that it dealt with the same question. I should want to take some time to look into the matter. But I am glad, at least, the Senator agrees that the language as originally proposed by him, of a double-reasonableness provision, does not have any place in this amendment.

Mr. O'MAHONEY. I have not said that, and I do not think it requires a double reasonableness.

Mr. KEFAUVER. But it requires a reasonableness and a probability.

Mr. O'MAHONEY. Before I introduced the language of my original amendment, I submitted it to members of the staff of the Federal Trade Commission who were absolutely upon the same side of the question of monopoly as is the Senator from Tennessee and the Senator from Wyoming. So that when the question was not raised there with respect to the matter, I saw no particular reason for raising it here.

Mr. WHERRY, Republican, Nebraska. Mr. President, I ask the distinguished Senator from Wyoming whether he has yet offered the amendment in the nature of a substitute.

Mr. O'MAHONEY. I have not offered the substitute. I was trying to whip it into shape that would be acceptable to all concerned, and I think we have it now substantially in that form, if the Senator from Tennessee and I can come to a meeting of minds with respect to the definition we have been discussing.

Mr. KEFAUVER. The Senator from Alabama is looking over the language and considering it. But I wondered if the Senator from Wyoming would agree that it should not be written into this bill that good faith is a defense even when there might be ruinous discrimination in the matter of costs by virtue of absorption of freight rates to seller competitors of a larger purchaser. In other words, does the Senator feel that the effect of the Standard Oil decision, which incidentally I failed to mention was delivered by a former distinguished Member of this body, Judge Minton, should be maintained in whatever legislation is written?

Mr. O'MAHONEY. I am not altogether certain that that is essential, because, as I said in response to the Senator from Louisiana, I do not think it is quite necessary, after the precautions which have been established here, to cling to language which would seem to have the effect of making it necessary to sustain uneconomic and inefficient operations.

Mr. KEFAUVER. Of course, the uneconomic and inefficient operations have always been a reason, and a justifiable reason, for the Federal Trade Commission under its rules and under the law, but I am sure the Senator does not want the matter of the good faith defense to be such a defense that it is really going to lessen competition substantially.

Mr. O'MAHONEY. The way to meet an issue of this kind is to present an amendment.

Mr. KEFAUVER. I wonder what the Senator would say if somewhere in subsection B, section 2, an amendment were proposed in language somewhat to this effect, "except where the effect of such absorption of freight would be to substantially lessen competition." That would give the Federal Trade Commission the benefit of the Standard Oil case, which the court felt covered a very substantial right to be retained in the Federal Trade Commission.

Then on page 3 there would have to be a similar amendment, "except where the effect of the discrimination would be to substantially lessen competition."

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Mr. O'MAHONEY. Mr. President, I cannot interpret the effect of what the Senator proposes off the cuff, as it were. I should like to say to the Senator that one of the purposes which I entertained in offering this provision was to make sure that the system which has been used, without criticism, by the sugar-beet industry, of selling at delivered prices by absorbing freight, should not now be disturbed. Not to my knowledge has there been any charge against the sugar-beet processors of any monopolistic practices. There are several beet producers in my part of the country who are competing with one another. The system by which they have absorbed freight has been such that they have never been able to go beyond the Mississippi in the transportation of their sugar, because they could not afford to absorb freight beyond that point and thus get to the eastern seaboard. I wanted to be sure that that great western industry was not being unduly affected by the decision.

Mr. KEFAUVER. I have no desire to affect that industry in its operation whatsoever. I certainly agree with the Senator that the Cement case was fairly clear, and it does not prohibit absorption of the freight, if it is done independently, and not in collusion, or for any unlawful purpose.

It seems to me that great protection might be taken away from the small competitors if good faith is based upon the fact that somebody else is doing something. I think good faith should be a matter of whether there is a lessening of competition as a result of what is being done. That was found in the Standard Oil case, and I have an amendment prepared which I should be glad to have the Senator consider. If the section we are discussing and section D could be worked out satisfactorily, I should have no objection.

Mr. O'CONOR. Mr. President, will the Senator from Wyoming yield?

Mr. O'MAHONEY. I yield to the Senator from Maryland.

Mr. O'CONOR. Let me ask the Senator from Wyoming and the Senator from Tennessee whether language similar to what I shall propose would be acceptable, or would in their opinion meet the situation. On page 2, line 17, after the words "good faith," insert "except where the result is substantially to lessen competition."

Mr. KEFAUVER. That is substantially what I have suggested to the Senator from Wyoming.

Mr. O'MAHONEY. That is almost identical with the Senator's amendment. The amendment to be offered by the Senator from Tennessee is on page 2, line 17, after the words "good faith," to insert "(except where the effect of such absorption of freight will be to substantially lessen competition)."

Mr. O'CONOR. I rather think that the two phrases mean almost the same thing.

Mr. KEFAUVER. They mean identically the same thing.

Mr. O'MAHONEY. The Senator desires to offer the same amendment on page 3, line 10.

Mr. President, since I have not yet offered the amendment, I shall accept the suggestion of the Senator from Tennessee and now offer the amendment as a whole.

Mr. KEFAUVER. Has the Senator decided what course he wishes to take in connection with subsection D on page 4?

Mr. O'MAHONEY. I suggested to the Senator the alternative to take the words out of the existing Administrative Procedure Act, and in line 6, on page 4, to insert the words "is substantial and probative evidence of the specified effect."

Mr. KEFAUVER. That will be satisfactory to me.

Mr. O'MAHONEY. Mr. President, the amendment as now modified I offer as an amendment to the pending bill, by striking out all after the enacting clause and offering this language in its place.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Wyoming in the nature of a substitute.

. . . . . .

The amendment in the nature of a substitute to the amendment was agreed to, as follows:

> That the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U. S. C. 45) is amended by adding at the end of section 5 (a) the following: "It shall not be an unfair method of competition or an unfair or decep-

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tive art or practice for a seller, acting independently, to quote or sell at delivered prices or to absorb freight: *Provided,* That this shall not make lawful any combination, conspiracy, or collusive agreement; or any monopolistic, oppressive, deceptive, or fraudulent practice, carried out by or involving the use of delivered prices or freight absorption."

SEC. 2. Section 2 (a) of an act entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914 (38 Stat. 730, as amended; 15 U. S. C. 13), is amended by substituting for the period at the end thereof a colon and adding thereto the following: *"And provide further,* That it shall not be an unlawful discrimination in price for a seller, acting independently—

"A. to quote or sell at delivered prices if such prices are identical at different delivery points or if differences between such prices are not such that their effect upon competition may be that prohibited by this section; or

"B. to absorb freight to meet the equally low price of a competitor in good faith (except where the effect of such absorption of freight will be to substantially lessen competition), and this may include the maintenance, above or below the price of such competitor, of a differential in price which such seller customarily maintains."

SEC. 3. Section 2 (b) of an act entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914 (38 Stat. 730, as amended; 15 U. S. C. 13), is amended to read as follows:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price the effect of which upon competition may be that prohibited by the preceding subsection, or discrimination in services or facilities furnished, the burden of showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided further,* That a seller may justify a discrimination (other than a discrimination which will substantially lessen competition) by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

SEC. 4. As used in this act—

A. The word "price" shall have the meaning which it has under the commercial law applicable to the transaction.

B. The term "delivered price" shall mean a price at which a seller makes or offers to make delivery of a commodity to a buyer at any delivery point other than the seller's own place of business.

C. The term "absorb freight" shall mean to establish for any commodity at any delivery point a delivered price which, although as high as or higher than the seller's price for the same commodity at the point from which such commodity is shipped, is lower than the sum of the seller's price for such commodity at such point of shipment plus the actual cost to the seller for transportation of such commodity from such point of shipment to the delivery point or the average cost of transportation to the seller.

D. The term "the effect may be" shall mean that there is substantial and probative evidence of the specified effect.

A wise but rather cynical philosopher once said that it was in the ballet, and only in the ballet, that the female of the human species appeared at her best. When pressed to give his reasons, he said: "Because she is able to exhibit every grace and charm of woman and she does not speak!"—*Woman's Journal* (London)

A pompous physician who was inclined to criticize others was watching a stonemason build a fence for his neighbor, and thought the mason was using too much mortar. He said, "Jim, mortar covers up a good many mistakes, does it not?"

"Yes, doctor," the stonemason replied, "and so does the spade."—*Anecdotes*

It was his first speech, and he wanted it to be a success. His oration was long and passionate, and he wished to end it with a warning note.

He could have couched his warning in the old proverb about locking the stable door after the horse had been stolen, but that was too commonplace. He wanted something better. Then he shouted: "Don't, I beg of you—don't wait until the house catches fire before you summon the firemen!"—*Tit-Bits* (London)

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